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**THE
NATIONAL
BANKRUPTCY REGISTER
REPORTS.**

**CONTAINING ALL THE
IMPORTANT BANKRUPTCY DECISIONS**

**IN THE
UNITED STATES.**

EDITORS:

WILLIAM A. SHINN, RAPHAEL J. MOSES, JR

VOLUME I.

**NEW YORK:
J. R. McDIVITT,
LAW BOOKSELLER AND PUBLISHER,
111 NASSAU STREET.
1874.**

315067

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108 to 114 WOOSTER STREET, N. Y.**

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THE NATIONAL BANKRUPTCY REGISTER REPORTS.

VOLUME I.

U. S. DISTRICT COURT, S. D. NEW YORK.

The United States district court, sitting in bankruptcy, has power, by injunction, to stay proceedings in the state courts against a bankrupt.

In re HORATIO REED.¹

ON a petition for a stay of proceedings in the state courts against the said Reed, Judge Blatchford established a precedent for a liberal construction of section 21 of the bankrupt act, by issuing an order as follows :

The petitioner in this case having, on the 7th day of June, 1867, duly filed his petition in bankruptcy in the office of the clerk of this court, for the purpose of obtaining the benefit of the act of congress, approved March 2, 1867, entitled "An act to establish a uniform system of bankruptcy throughout the United States," and it appearing, to the satisfaction of this court, that Walter S. Vose and James F. Joyce obtained a judgment in the supreme court, State of New York, against the said Horatio Reed, on the 18th day of August, 1860, for the sum of \$1,103.78 damages and costs; and that an execution upon said judgment against the property of the said Horatio Reed has been duly issued and returned wholly unsatisfied, and that the said judgment is a debt provable

¹ Cited in *Wright's case*, 2 N. B. R., 58, *quarto*, and *Ex parte Donaldson*, *post*, page xxxix.

In re Julius A. Boylan.

under the said act, and that proceedings are now pending on said judgment in the said supreme court, by means of an order for the examination of the said Reed as a judgment debtor, issued on the 24th day of May, 1867, by the Hon. Josiah Sutherland, one of the justices of the said court.

Now, therefore, it is hereby ordered that all proceedings under the said order, and all further proceedings upon the part of the plaintiffs in the said judgment, upon the said judgment, be, and the same are hereby upon the application of the said Horatio Reed, stayed to await the determination of this court in bankruptcy, on the question of the discharge of the said Horatio Reed, under the said act, until the question of his discharge thereunder shall have been determined by this court.

S. BLATCHFORD, *District Judge.*

June 12, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where one partner residing in New York city, petitioned individually, and was adjudged bankrupt, and two other partners residing in Cincinnati, Ohio, petitioned as copartners to be allowed to join in the application of the first, and file their petitions in the same district: *Held*, That the court had no jurisdiction to grant such leave, as the single partner had petitioned as an individual debtor for an individual discharge.

In re JULIUS A. BOYLAN.

BLATCHFORD, J. The petition of Daniel K. Harvey and Thomas H. Boylan, shows that they were copartners with Julius A. Boylan, and carried on business under the firm name of Boylan & Co., at Cincinnati, Ohio, until April 19, 1861, when the copartnership was dissolved; that Julius A. Boylan, on the 27th of June, 1867, filed his petition in this court for his discharge in bankruptcy, and was adjudged a bankrupt on the 28th of June, 1867; that he had no individual assets except such as are exempt, nor are there any copartnership assets of any kind; that all the indebtedness of Julius A. Boylan is the copartnership debts, as appears by his

In re Julius A. Boylan.

petition and schedules ; that Harvey and Thomas H. Boylan reside in Ohio ; that they have no debts except the copartnership debts of Boylan & Co., and their liabilities are for exactly the same amounts and to the same individuals as those of Julius A. Boylan ; that they are about to take the benefit of the bankruptcy act, but cannot do so without incurring a large and unnecessary expense if compelled each individually to proceed under the act ; that the creditors of the firm are one hundred and eighteen in number, and that they would be put to great expense and trouble if compelled to attend the meetings of the creditors of the firm in two different parts of the country as far apart as New York city and Cincinnati, Ohio. The petitioners pray that leave be given them to join in the application of Julius A. Boylan for their discharge in bankruptcy under the act, and that they have leave to file their petitions under the act in this court, and that all proceedings under such petition be had in this district, and that all proceedings on the part of Julius A. Boylan be stayed until the final disposition of such petition. In support of the prayer of this petition, reference is made to the thirty-sixth section of the bankruptcy act, which provides "that where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners shall be taken, except such parts thereof as are hereinbefore excepted ;" and that "if such copartners reside in different districts, the court in which the petition is first filed shall retain exclusive jurisdiction over the case."

It is urged that under these provisions all the partners of the firm of Boylan & Co., of which Julius A. Boylan was one, can come into this court without regard to their place of residence or doing business, and ask for their discharges, provided Julius A. Boylan resides or does business in this district, and first files his petition here.

In re Julius A. Boylan.

The difficulty in the view thus urged is that Julius A. Boylan has petitioned merely as an individual for his individual discharge, and has been individually adjudged a bankrupt. The thirty-sixth section of the act applies only to a case where two or more persons who are partners in trade are adjudged bankrupt. It would apply to the present case if, on the petition of Julius A. Boylan, two or more members of the firm of Boylan & Co. had been adjudged bankrupt. The clause of the thirty-sixth section which provides that where "such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case," means that where two or more petitions are filed in different districts, praying that two or more persons who are partners in trade be adjudged bankrupt, and such partners reside in different districts, the court in which the first in order of time of such petitions is filed shall have exclusive jurisdiction to do what the thirty-sixth section allows and requires to be done in a case where two or more persons who are partners in trade are adjudged bankrupt. That clause has no application to the present case. There has not been any petition yet presented to any court so far as appears, praying that the partners composing the firm of Boylan & Co. be adjudged bankrupt. Such a petition can be presented by Harvey and Thomas H. Boylan to the court which, under the eleventh section of the act, has jurisdiction of such a petition. If such a petition be presented by them, and Julius A. Boylan refuses to join in it, the eighteenth Rule of the general orders in bankruptcy will apply to the case.

These views are strengthened by the language of the sixteenth Rule of the general orders in bankruptcy, which

ii provides as follows: * "In case two or more petitions for adjudication of bankruptcy shall be filed in different districts, by different members of the same copartnership, for an adjudication of the bankruptcy of said copartner-

N. B. — The Roman characters at the side of the page refer to the Supplement, and the numerals to vol. i. of the Register *in quarto*.

In re Adolph Baum.

ship, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed." The prayer of the petitioner is denied.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where a creditor at the first meeting of creditors gave notice of intention to oppose the discharge, and filed objections, the reception whereof was opposed by bankrupt at that time: *Held*, That a creditor who had proved his debt could file specifications in opposition to the discharge at any time before the period fixed by General Order xxiv.

In re ADOLPH BAUM.

BLATCHFORD, J. In this case the register certifies that a creditor has given notice of his intention to oppose the discharge of the bankrupt, and has handed in a list of objections to the discharge; that the bankrupt opposes the reception of the objections at this stage of the proceedings, it being the first meeting of creditors specially for the proof of debts and the choice of an assignee; and that the opinion of the court is desired on the question as to whether the objections can now be received. The register refers to section 31 of the act, which provides that any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court. The register states that in this case the petitioner reports no assets whatever in his schedule; that the creditor is not satisfied with this, and has declared his intention of applying as soon as the appointment of the assignee, which has been made, is approved, for an order to examine the bankrupt and other persons, under section 26, with a view to finding assets, as

In re Adolph Baum.

well as proving the specific charges of fraud which the creditor has specified in the paper filed by him.

The register states that this seems to suggest the following questions : (1.) When shall a creditor so file his objections ? (2.) When the objections are so filed, may the register make an order that the bankrupt and others appear to be examined ? (3.) Is it competent for the creditor to examine the bankrupt and others *ad libitum* to find property, as well as to establish his specifications of fraud and other objections to the discharge ?

The register observes that if the provisions of the act will permit, it would seem to be well if something of this kind could be done at an early period of the proceedings ; first, to quiet all groundless fears ; and second, to ascertain what facts and what issues it is worth while to bring before the court for trial ; that such a proceeding would be quite in analogy with the provisions of section 391 of the Code of Procedure of the State of New York, which has at times a very healthy operation ; that if after such examination the register could certify to the court the precise issues that exist between the respective parties, and which the court must try, very much labor and vexation would be spared to the court, who really has less convenience for getting at such issues than the register, before whom the testimony is taken, and who fully knows the whole case ; that the provisions of Rule 24 of the "General Orders in Bankruptcy," to the effect that a creditor opposing the application of a bankrupt for discharge shall enter his appearance in opposition thereto on the day when the creditors are required to show cause and shall file his specification of the grounds of his opposition, in writing, within ten days thereafter, unless the time shall be enlarged by order of the district court in the case, and the court shall thereupon make an order as to the entry of said case for trial on the docket of the district court, and the time within which the same shall be heard and decided, are not in antagonism with this view ; that Rule 24 contains nothing prohibitory, and may be fully operative on those who have

In re Adolph Baum.

not theretofore appeared; that the creditors who have filed objections and examined the bankrupt and other witnesses, and got out all the facts which they desire, may well come into court at the time prescribed in Rule 24, enter an appearance, and file such specifications as they on the whole have concluded they will be able to sustain, and thereupon proceed as specified in Rule 24; that he can see no objection to any creditor who may see fit to file objections with the register, or perhaps without that, proceeding at once to examine the bankrupt and other witnesses, and thereby fully preparing himself to take the steps prescribed in Rule 24; and that the 26th section of the act would fail in having some of its specifications carried out if an opposite view were taken, as power is there given to the court, "at all times," to require the bankrupt to attend and be examined.

I fully concur in these general views of the register. A creditor who has proved his debt may file at any time the specification in writing of the grounds of his opposition to the discharge of the bankrupt referred to in section 21 of the act. Rule 24 of the "General Orders in Bankruptcy" is enabling, and not prohibitory. A creditor who does not file his specification by the time specified in Rule 24, will lose his opportunity of doing so. But he has a right to file such specification at any time after he has proved his debt, and before the time limited by Rule 24. The filing of such specification is not, however, a necessary prerequisite to the making of an order under section 26 of the act, that the bankrupt or other persons attend and be examined as to the matters specified in that section. Such order may be made and such examinations may be had on the application of the assignee, or of any creditor who has proved his debt, or on the suggestion of the register himself, or without any application, and without the previous filing of any specification under section 31 of the act. The bankrupt and all other persons are subject to examination, at all times, at the instance of the assignee, or of any creditor who has proved his debt, or of the court, or of the register, in regard to any of the matters specified in section 26.

In re Jesse H. Robinson.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where papers are designated by rules of the court in which notices are to be published, the register cannot substitute other papers therefor in the district, but he may, in the exercise of judicial discretion, select other newspapers without the district, in which notices shall be published.

In re JESSE H. ROBINSON.

BLATCHFORD, J. In this case the register has designated in the warrant as the newspapers in which publication of notice to creditors shall be made, two newspapers in the city of New York, one in Toledo, Ohio, and one in San Francisco, California.

The register claims to have made these designations in accordance with the provisions of section 11 of the bankruptcy act, of Rule 5 of the "General Orders in Bankruptcy," and of Rules 5 and 21 of this court in bankruptcy. He also reports that the designation of the newspapers in Toledo and San Francisco is rendered proper by the fact that a great majority in number of the creditors of the bankrupt reside in California, Ohio, Indiana, and other places out of the city of New York, where the bankrupt is stated in his petition to reside.

The bankrupt objects to so much of the designation as specifies the newspapers out of the city of New York, and the warrant has been withheld by the register to await the decision of the court on the point which has been certified to the court. The objection taken is, that the power of the register in regard to the designation of the newspapers, is only that which is given to him by Rule 5 of the "General Orders in Bankruptcy;" that such power as there given, is the power of "directing, *unless otherwise ordered by the court*, the newspapers in which the notices shall be published by the messenger;" that the register has been divested of that power by Rules 5 and 21 of this court in bankruptcy, Rule 5 providing that the warrant shall specify two, if there be two, and if not, then one of the newspapers

In re Jesse H. Robinson.

named in Rule 21, published in the county, &c., the selection of such newspapers to be made by the register, &c. ; and Rule 21 declaring that " the following newspapers are designated as those in which all publications required by the act, or the ' General Orders in Bankruptcy,' or these Rules may be made," and specifying thereafter only newspapers published in this district. It is claimed that under Rule 21, all publications must be made in the newspapers therein designated, and cannot be made in any others, either as additional or substituted.

In case it be held that the register has such power, the decision of the court is asked as to the cases or class of cases in which, and the grounds upon which, such power may be exercised. As bearing on that subject, it is stated that in the present case it appears by the schedule to the petition, that a majority in value of the creditors reside in the city of New York. It is also urged that the publication of notices under the warrant in other newspapers than those designated in Rule 21, in lieu of or in addition to the same, would work peculiar hardship to the petitioner in the vast majority of voluntary applications.

The register certifies that in his opinion the publication in the foreign newspapers is necessary in this case, in order to protect the creditors in *their rights, the theory being, that the newspaper publication is for the ben- iii
efit of the creditors ; that the Toledo and San Francisco papers would be more likely to inform the foreign residents than the New York papers would ; that the selection of foreign newspapers ought to be left to the wise discretion of the register, as he has clear information in each case of the residence of the creditors from the schedules, and that while the debtor might object to the expense of publication, yet he seeks relief from his creditors in an action of which they should be notified with reasonable certainty.

I think that the register has power in a case like the present one to designate foreign newspapers in addition to those selected by him under Rule 5 of this court from among the

In re Jesse H. Robinson.

newspapers named in Rule 21 of this court. He must in all cases observe Rule 5, and select from the newspapers named in Rule 21. He cannot *substitute* other newspapers whether published in or out of the district, for those which he is required by Rule 5 to select. But, in a proper case he may, in the exercise of a wise discretion, add other newspapers *not published in this district* to the newspapers which he selects under Rule 5, although he cannot add newspapers published in this district. Rule 5 requires publication to be made in certain newspapers within this district, but was not intended to prevent publication being made in addition, in proper cases, in other newspapers out of this district. So, also, Rule 21 only specifies the newspapers from which a selection is to be made, when newspapers in this district are to be selected, and was not intended to affect the selection of newspapers out of this district in addition to the others in proper cases. Such selection of additional newspapers out of this district must be left to the registers, and is left to them by Rule 5 of the "General Orders in Bankruptcy." They must exercise a proper judicial discretion on the subject. It is impossible to specify in advance the cases or classes of cases, or the grounds for the exercise of the power.

In the present case it appears that although a majority in value of the creditors reside within the city of New York, yet a great majority in number of the creditors reside without the city of New York. By section 13 of the act, the choice of the assignee is to be made by "the greater part in value and in number of the creditors who have proved their debts." It is therefore as important for twenty small creditors in Ohio and California to be notified of the first meeting of creditors, as it is for one large creditor in New York, although the debts due to the latter exceeds the aggregate of the debts due to the former. Nothing is shown to throw a doubt on the propriety of the exercise by the register in this case of the power he possesses, or on the wisdom of selecting the particular foreign newspapers which he has selected.

The register suggests in his certificate that he thinks that

In re James Macintire.

in this case, and in many cases where there are few or no creditors resident in New York, publication in one New York paper would be sufficient. I think it will be better to adhere to Rule 5 in all cases. A non-resident creditor who knows where his debtor resides, is likely in view of the act to have the newspaper published in the place of residence of his debtor scrutinized, to see if any notice of the debtor's bankruptcy be published, and the extent of the publication at the place of residence of the debtor ought not to be abridged.

U. S. DISTRICT COURT, S. D. NEW YORK.

Application was made for an order to examine the bankrupt on behalf of a creditor, and the creditor objecting to the charge of a fee of \$1, by the register for such order: *Held*, That such an order was not an "order where notice was required to be given" under General Order 30, nor was it an application for any meeting, under section 47, and the register was not entitled to such fee.

Where creditor applies under section 26 of the act, for an order for examination of the bankrupt, he must pay the register's fees allowed by law. Whether such fees will ultimately be paid out of the estate, not considered.

*In re JAMES MACINTIRE.*¹

BLATCHFORD, J. In this case the register certifies that the first meeting of creditors was held July 11th, at which notice was given of an application next day for an order to examine the petitioner on behalf of a creditor, and the meeting was duly adjourned to July 12th. On that day, the petitioner attending, a creditor who had filed proof of his claim applied for an order in pursuance of said notice, for the examination of the petitioner on behalf of the creditor, at that time the petitioner not objecting to the time, but insisting that the creditor must pay the register's fees for the order. The creditor refused to pay the fees, insisting that they must be paid out of the deposit of fifty dollars made by the petitioner with the clerk. The register proposed to grant

¹ Cited *In re Clarke*, *post*, page xli.

In re James Macintire.

the order on payment by the creditor of one dollar as the proper fee. At the request of the creditor the register has certified the question for the decision of the court.

The register in his certificate refers to that portion of the 4th section of the bankrupt act, which provides that the fees of the registers, as established by the act, and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by the act. He also refers to that part of Rule 29 of the General Orders in Bankruptcy, which provides that the fees of the register shall be paid or secured in all cases before he shall be compelled to perform the duties required of him by the parties requiring such service. He also states it to be his opinion, that the granting of the order for the examination of the bankrupt having been required by the creditor, and not by the bankrupt, the former, and not the latter, ought to pay the fees of the order.

On the part of the creditor it is claimed that such fees as are connected with the personal examination of the bankrupt, are governed by the 47th section of the act; that the bankrupt is compelled by that section to deposit fifty dollars for that purpose; that that section contemplates that the services of the register in the examination of the bankrupt are services required by the bankrupt, and not by the creditor; that under the 47th section, the register was entitled to charge three dollars for the adjourned meeting of creditors on the 12th of July, such fee to be paid by the bankrupt; that such fee was the only fee the register had a right to charge, there being no provision by which he could exact one dollar from the creditor for entering an order for the examination of the bankrupt; that no such order was required; that there are services of the register specified in the 4th section of the act, which may be required of a creditor, and for which he should pay; but that the act does not contemplate that a creditor shall pay for the register's services in examining the bankrupt for the purpose of seeing whether

In re James Macintire.

he has made a proper exhibit of his affairs, when he calls a meeting of his creditors for that purpose; that under the 47th section the bankrupt must pay the register for that service, the three dollars for the meeting of creditors, and also the fees allowed by law for taking his deposition; that section 26 of the act requires the bankrupt at all times to attend and submit to an examination on oath upon all matters relating to the disposal of his property, &c.; that the fees for such examination are provided for by section 47 of the act; that that section says, that such fees shall be paid out of the estate and have priority over all other claims; that the court may, under Rule 29 of the "General Orders in Bankruptcy," exercise its discretion as to the payment of the whole or a part of the fees out of the fund in court, but that without such direction from the court, the register must look to the funds in court for his fees in such a case as the present.

The views urged for the creditor are thus fully stated, in order that it may be seen that the question has been considered by the court in all its aspects. The fee of one dollar proposed to be charged by the register, in this case, for making the order for the examination of the bankrupt, is not provided for by the act, and is not at all provided for, unless it is covered by the following provision of Rule 30 of the "General Orders in Bankruptcy," under the head of "Fees to the Register": "For every order made where notice is required to be given, and for certifying copy of the same to the clerk, one dollar." This provision allows a fee of one dollar for making an order, and for certifying a copy of the same to the clerk, in a case where previous notice is required to be given to an adverse party of the application for the making of the order before the order can be made. That this is the meaning of that provision of Rule 30 of the "General Orders," is shown by the language of Rule 8 of the "General Orders." In the present case, no notice was required to be given to any party of the application for the order for the examination of the bankrupt before the order could be made. By the 26th section of the act, it is pro-

In re James Macintire.

vided that the court may, at all times, require the bankrupt upon reasonable notice, to attend and submit to an examination on oath, upon all matters relating to the disposal or condition of his property, &c. An order requiring the bankrupt so to attend and be examined, and service of such order on him a reasonable length of time previously, are necessary, and the form of such order is prescribed by Form No. 45, of the form specified in the schedule annexed to the "General Orders in Bankruptcy." But no previous notice is required to be given to any person of the application to the register by the creditor for the making of the order. It is to be made *ex parte* on the application of the creditor. It
iv may also, under section 26 of the act, be made by the register *ex parte* on the application of the assignee, or by the register on his own suggestion without any application. The register was, therefore, not entitled to charge any fee for making the order in this case.

There are many specific services which must be rendered by the registers, and for which no specific fee is provided either by the act or the "General Orders in Bankruptcy." Their compensation for such service is covered by the specific fees which are enumerated in the act and the "General Orders." Thus the register receives two dollars for issuing a warrant, but no specific fee is provided for the adjudication of bankruptcy, Form No. 5, which the register must make before he can issue the warrant. He receives compensation for making the adjudication in the fee of two dollars, which he receives for issuing the warrant. That fee of two dollars is a fee for doing everything (a fee for which is not otherwise specially provided for), which results in the issuing of the warrant, and no specific fee is provided for the service of examining the bankrupt's petition and schedules, when such examination results in the withholding of the adjudication of bankruptcy. So also the fee of three dollars to the register for an order for a dividend, covers all his services not otherwise provided for, which result in the making of the order for the dividend; and the fee of two dollars to the

In re James Macintire.

register for every discharge, when there is no opposition, covers all his services not otherwise provided for, which results in the granting of the discharge. The making of the order in this case for the examination of the bankrupt, not having any fee specially attached to it, must be considered as compensated by some one or more of the fees which are enumerated.

The fee of one dollar for the order cannot be considered as authorized by the provision of the 47th section, which gives a fee of one dollar to "every application for any meeting in any matter" under the act. The word "meeting," wherever used in the 47th section and elsewhere in the act, means a meeting of creditors, such as is spoken of in the 12th, 27th, and 28th sections. The application by the creditor for the order for the examination of the bankrupt, cannot be regarded as an application for a meeting of creditors.

As the register was bound to make the order asked for, without requiring the payment by the creditor or any other person of any specific fee for such order, this decision might properly go no further than to dispose of that point. But in view of the positions urged by the counsel for the creditor, it is deemed proper to lay down some propositions which are applicable to this case, and which have been carefully considered.

1. Where a creditor applies under section 26 of the act, for an order for the examination of the bankrupt, the creditor must pay to the register the fees allowed by law for taking the deposition of the bankrupt, not only for his direct examination but for his cross-examination, if any, and the register is not required to look in the first instance for such fees to the bankrupt, or to the fifty dollars deposited by him, or to the bankrupt's estate.

2. Whether such fees shall ultimately be paid out of the estate, will be a question for consideration hereafter.

The clerk will make a certificate of this decision to the register, Edgar Ketchum, Esq.

July 19, 1869.

In re William D. Hill.

U. S. DISTRICT COURT, S. D. NEW YORK.

Two creditors who had not proved their debts appeared at the first meeting, by their attorney, who filed preliminary objections to the proceedings which the bankrupt moved to strike out. Upon the questions thus raised and certified for the decision of the court, it was *held* :

1. That an objection so filed, that the bankrupt had omitted property from his schedules, was not "an opposition to the discharge of the bankrupt." In no event would such objection avail unless it specified the particular omissions relied on.
2. The statement of a wrong middle letter of the bankrupt's name, in the notice sent to a creditor, is not a material variance. *Semble*, That the return by the marshal as to the service of notice on creditors, is not conclusive. Sections 12 and 13.
3. It is a sufficient statement in the bankrupt's schedules, to give the sum and date of the debt.
4. Schedules are defective if they do not set forth the separate items of the bankrupt's personal estate, and they may be remedied by amendment at the instance of the bankrupt.
5. The register cannot inquire into the authority of an attorney or counsellor of the circuit or district court, to appear for creditors.
6. Creditors who have not proved debts have no voice or vote in choice of an assignee, or any right to be heard by attorney or otherwise, in opposition to the proceedings in bankruptcy.
7. The certificate of the register to the sufficiency of the inventory of the debtor's debts, is not so conclusive as to prevent inquiry when the question is raised by a proper party at the proper time, and in the proper manner.

*In re WILLIAM D. HILL.*¹

BLATCHFORD, J. In this case, on the day appointed for the first meeting of creditors, two of the creditors of the bankrupt appeared by Theodore R. Westbrook, Esq., as their attorney. They did not appear in person, nor were their debts proved; but Mr. Westbrook filed with the register preliminary objections to the proceedings, on behalf of each of the two creditors for whom he appeared.

The objections were: *First*, That the notices to the creditors gave the name of the debtor as Wm. B. Hill, instead of Wm. D. Hill. *Second*, That the petition did not state the sum due to each creditor, nor the nature of each debt or demand, nor the true cause and consideration of the indebted

¹ Cited in *Pulver's case*, Sup. p. xi.

In re William D. Hill.

ness in each case and when the same arose, and did not comply, as to the details required to be stated in it, with the 11th section of the bankrupt act. *Third*, That the inventory of the estate did not show the items of the debtor's alleged personal estate, and the value at which it was estimated, so that it could be determined whether the property was, or was not, exempt by law, and that the inventory was insufficient and defective under the requirements of said 11th section. *Fourth*, That the debtor had omitted from his schedule property, claims, demands, and rights of action, owned by him, or held by others for his use and benefit.

The bankrupt, by a written paper, filed with the register, moved to strike out such preliminary objections on the creditors on the following grounds: *First*, That the creditors had not appeared in person nor by an attorney authorized to practise in the district or circuit court of the United States, who was authorized to appear for them in this matter; that Mr. Westbrook's name indorsed on the objections, was not written by him, nor had he appeared in court to sanction its use, and that he could not delegate to other counsel or attorneys the use of his name, unless he, in fact, acted as attorney in the case. *Second*, That the creditors had not proved their claims, and could raise no objections until they established the fact on their part that they had claims against the bankrupt's estate. *Third*, That the first objection on the part of the creditors was frivolous, because the proof of service of notice by the marshal appeared to be regular, and was conclusive, and was, in fact, uncontradicted. *Fourth*, That the second objection on the part of the creditors was frivolous, because the inventory was made for the information of the court and not to the creditor as to the amount and nature of each claim, and the certificate of the register as to its sufficiency was conclusive, and because the inventory was sufficient. *Fifth*, That the third objection on the part of the creditors was frivolous, because value is never certain, and can only be estimated, and the value of the debtor's personal estate was so stated; that a full schedule of household furni-

In re William D. Hill.

ture was not required by the act, and that the examination of the bankrupt was not intended to be superseded by the inventory. *Sixth*, That the fourth objection on the part of the creditors was frivolous, because it was too indefinite, and that it ought to specify what particular omissions have been made from the schedule. The debtor also asked that the creditors be charged with the costs and expenses of the decision of the objections made by them. It was agreed that the questions thus raised should be submitted to the court, and the case was adjourned. The register states in his certificate that he would have assumed to decide the several questions raised except for the fourth objection raised by the creditors, which seemed to him to go to the merits of the whole proceeding, and to constitute such "an opposition to the discharge of the bankrupt" as necessitated a reference to the court under the act, and the General Orders.

The fourth objection was that the debtor had omitted from his schedule property, claims, demands, and rights of action owned by him, or held by others for his use and benefit. The objection cannot be regarded as "an opposition to the discharge of the bankrupt." Until the bankrupt applies under section 29 for his discharge, no objection filed or raised to any proceeding can be considered as "an opposition to the discharge." Besides under sections 30 and 31, no creditor who has not proved his debt can oppose a discharge. In this case the creditors have not proved their debts.

The register also states in his certificate that if the adjournment of the case by the register was irregular, he assumes that the court may vacate such adjournment under its general power over the bankrupt, and require an appearance in court. The adjournment was regular.

* The register also states in his certificate that if he
v had assumed to decide the first preliminary objection
raised by the creditors, he would have held that the
variance, by the use of the name of William B. Hill instead of
that of William D. Hill in the notices, was not material, and
would not be regarded in law or equity unless the party had

In re William D. Hill.

been misled ; that it is evident that the creditors who appear and raise the objections are not misled ; that all the papers in the case, and the notices published in the newspapers, gave the bankrupt's name correctly, and that only the notices served on the creditors who appeared gave the middle letter of the bankrupt's name as *B.* instead of *D.* The variance in this case was not material, and the first objection taken by the creditors was untenable.

The register states that he does not regard the return by the marshal as to the service of notice on the creditors as conclusive. Under sections 12 and 13 of the act such return is not conclusive.

The register states as to the second objection taken by the creditors, that he should have regarded the statement in the schedule of the amount due to each creditor as sufficient, whenever the sum and the date of the debt or judgment was given ; that to ascertain the exact amount at any stage of the proceedings only required a computation of interests ; that any other mode is impracticable with the form of schedules adopted by the court ; that the details of place and consideration seem to be sufficient, and that if they are not they may be made so by amendment. The views of the register as to the second objection are correct.

The register states as to the third objection that he is of opinion that the schedules are defective in giving an inventory of the bankrupt's alleged personal estate, because they do not set forth the separate items of household furniture and wearing apparel, but that the omission may be remedied by amendment if necessary. The schedules are defective if they do not set forth such separate items, but the omission may be remedied by amendment under section 26 of the act, and Rules 7, 14, and 33 of the "General Orders in Bankruptcy."

The register states that the point made by the bankrupt against the appearance of the creditors named, did not seem tenable ; that William Lawton, Esq., first appeared for the creditors named, and that the objection being taken that

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he was not admitted to practise in this court, he called in Mr. Westbrook, who represented the creditors named for Mr. Lawton. The register is correct in his view that this point is not tenable.

Mr. Westbrook being an attorney or counsellor of the circuit or district court, has a right, under Rule 3 of the "General Orders in Bankruptcy," to appear for the creditors and conduct the proceedings for them; and if he so appears to conduct the proceedings, the register cannot, at the instance of the bankrupt, inquire into the authority given to him by the creditors. The certificate of the register that Mr. Westbrook was called in, and represented the creditors, is understood to mean that he appeared and conducted the proceedings for the creditors.

As to the second point made by the bankrupt, namely, that the creditors had not proved their claims, and could raise no objections until they established the fact on their part — that they had claims on the bankrupt's estate — the register states it to be his opinion that persons named as creditors in the debtor's schedule may appear and make any motion, and take any exception, without other proof of their debts than that contained in the bankrupt's papers. In this the register is mistaken. Under section 13 of the act, the two creditors in this case, not having proved their debts, would not, at the meeting at which the proceedings now certified took place, have been entitled to any voice or vote in the choice of an assignee. The meeting was under section 11 of the act, and the warrant "Form No. 6," a meeting of the creditors "to prove their debts, and choose one or more assignees." No creditor has, at such meeting, any right to be heard, either in person or by attorney, in opposition to any of the proceedings, until he has proved his debt. The fact that his debt is set forth in the schedules to the bankrupt's petition gives him no such right to be heard.

As to the fourth point taken by the bankrupt, the register states that he does not regard his certificate as to the sufficiency of the inventory of the debtor's debts as conclusive.

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Such certificate is not so conclusive as to prevent an inquiry into the sufficiency of such inventory when the question is raised at the proper time and in the proper manner, and on the suggestion of a proper party.

The register states that the fifth point taken by the bankrupt is argumentative. It is untenable except in so far as it claims that a full schedule of household furniture is not required by the act, and in that respect the views of the court have been hereinbefore stated,

As to the sixth point taken by the bankrupt, the register states that he thinks it well taken, and that the creditor who opposes a bankrupt's discharge on the ground of fraud or concealment, should be required to specify the particular matter of which he complains. The objection made (the fourth objection taken by the creditors) would in any event be of no avail unless made definite by specifying the particular omissions relied on. The clerk will certify this decision to Register Gates.

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The register fixed the day for the first meeting of creditors at sixty days after the date of the warrant, and directed notices to be mailed, postage paid, to the creditors, all of whom resided without the United States. The bankrupt objected that such creditors were to be notified constructively, and not by mail or personally, under section 11. *Held*, that the action of the register was correct. The fixing of the time is a matter of discretion with the register.

In re JULIUS HEYS.

BLATCHFORD, J. In this case all the creditors of the petitioner, some eight or ten in number, are foreigners, residing in Germany. On the return day named in the order of reference, the petitioner requested the register to fix a day, twenty days from such return day, as the day for the first meeting of creditors. The register decided that sixty days' time from the date of the warrant, when issued, was the shortest time that could reasonably be named in the warrant

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for the first meeting of creditors, and that notices should be sent by mail to the creditors by the messenger, properly directed, and with the foreign postage prepaid. The petitioner contended that the clause in the 11th section of the bankruptcy act, concerning service of notice on creditors by mail or personally, refers only to creditors residing within the United States, and that creditors residing out of the United States are under that section to be notified constructively by the publication of notice in the newspapers specified in the warrant. On the application of the petitioner, the register certified the proceedings to the judge for his decision thereon.

The register was correct in his decision. The 11th section of the act requires that the warrant shall authorize the messenger to publish notices in such newspapers as the warrant specifies, and to serve written or printed notices, by mail or personally, on *all* creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor. The same section then goes on to specify what particulars the notice so to be served shall state. One of these particulars is, that a meeting of the creditors of the debtor will be held "at a time and place designated in the warrant, not less than ten nor more than *ninety* days after the issuing of the same." This allowance of as much time as ninety days, in connection with the absolute requirement that notice shall be served, by mail or personally, on *all* creditors, shows clearly that it was the intention of Congress that as much as ninety days' time between the issuing of the warrant and the first meeting of creditors shall be allowed in cases where the creditors reside so far away as to make such an interval a reasonable one. The fixing of the time is a matter of discretion, which it was the province of the register to exercise in this case, and there is nothing to show that he did not exercise it wisely in fixing sixty days' time.

In re William H. Knoepfel.

U. S. DISTRICT COURT, S. D. NEW YORK.

S. claimed to act as attorney for L. W. & Co., a creditor, in the choice of an assignee, upon a power of attorney given to him by K., as attorney for L. W. & Co., acknowledged before a register who certified that K. was known to him as the authorized agent of L. W. & Co., and had acknowledged that he executed the power as such agent. The debt had been previously proved by K. making the affidavit in Form 25, but no power of attorney to K. was produced, nor was his attorneyship proved by the oath of any one. *Held*, that S. was not the duly constituted attorney of the said creditor.

In re WILLIAM H. KNOEPFEL.

BLATCHFORD, J. In this case, at the first meeting of creditors, Mr. J. A. Seixas claimed to act as the "duly constituted attorney" of Loeschigk, Wesendonck & Co. (a copartnership, creditor of the bankrupt, which had proved its debt), in the choice of an assignee. Mr. Seixas presented a letter of attorney, drawn according to Form No. 14 of the forms specified in the schedules, annexed to the "General Orders in Bankruptcy," executed and acknowledged before a register by Gustavus Kutter as attorney for the copartnership; but the attorneyship of Kutter was not proven by the oath of any person, nor was any power of attorney from the copartnership to Kutter *produced. The debt of the copartnership was proven by Kutter. His deposition, vi in proof of the debt, according to Form No. 25, contained the following averment: "That he, this deponent, is duly authorized by his principals to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated," &c.

The individual members of the copartnership, all of them, reside in Europe. The letter of attorney to Seixas was subscribed "Loeschigk, Wesendonck & Co., by G. Kutter," and was sealed and certified by a register to the effect that before him had appeared Gustavus Kutter, to him known, and known to him to be the authorized agent of the firm of Loeschigk, Wesendonck & Co., the individuals described in and who executed the foregoing letter of attorney, and acknowl-

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edged that he executed the same as the authorized agent of the said firm." Mr. Seixas claimed before the register that the proof of debt made by Kutter in behalf of the firm should be taken into consideration, in connection with the certificate of acknowledgment on the letter of attorney, for the purpose of showing Kutter's authority to duly constitute Seixas the attorney of the firm, to appear and act for it in all respects, including the voting in the choice of an assignee.

The register decided that the letter of attorney did not give to Seixas the authority which he claimed, because there was no evidence that Kutter held any power from the firm under which he could effectually give the letter; that by his oath on proving the claim, he had sworn that he was duly authorized to make that affidavit, not to execute letters of attorney, and that the mere acknowledgment of Kutter, that he executed the letter of attorney as the authorized agent of the firm, and the register's certificate of his personal knowledge of the identity of Cutter did not supply the place of proof by legal evidence, that Kutter was authorized to constitute Seixas the attorney of the firm to act for it at the meeting, so as to make Seixas the "duly constituted attorney" of the firm, under the 23d section of the bankruptcy act, which provides that "any creditor may act at all meetings by his duly constituted attorney, the same as though personally present." Thereupon, the question was, at the request of Mr. Seixas, certified to the judge for his decision.

The decision of the register was correct, and the clerk will make a certificate accordingly to the register, Edgar Ketchum, Esq.

U. S. DISTRICT COURT, WISCONSIN.

- Semble*, 1. That a regular taxation by the clerk, should be made of all the fees and disbursements in each bankrupt case.
2. The sum of \$50, deposited with the clerk, is not a fund in court for general distribution among creditors, but is to be disbursed under the supervision of the court.

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3. The sum, or such portion of it as may be necessary, may be appropriated to the register in the first place.
4. Where a bankrupt is relieved by order of the court from further payment of fees, the \$50 deposit will be distributed *pro rata* to the register, clerk, and marshal.
5. Printers' fees are chargeable according to the United States fee bill.

MILLER, J. The subject of costs and fees for services under the act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867, being brought up almost daily, I have prepared the following for the consideration of persons interested.

Section 47 of the act relates exclusively to the subject of costs and fees. The section is so unskillfully drawn as to cause uncertainty in its construction. In the first place it provides: "That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court, as now established by law, or as may be established by general order, under the provisions of this act, the following fees, which shall be applied to the payment for the services of the registers."

The fees of the clerk of the court are here allowed as now established by law, that is, by the general fee bill for similar services, or as may be established by general order under the provisions of this act.

Then follows a specification of fees, "which shall be applied to the payment *for the services* of the registers." Following the specification of register's fees is the provision, "Such fees (that is, the register's fees) shall have priority of payment over all other claims out of the estate, and before a warrant issues, the petitioner shall deposit with the senior register of the court, or with the clerk (by Rule 30 of the General Orders in Bankruptcy, *with the clerk*), to be delivered to the register, \$50 *as security* for the payment thereof. And if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel the payment to the register." It is here provided that the register's fees shall have priority of payment *out of the estate*. That fifty dollars shall be depos-

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ited with the clerk of the court, to be *delivered* to the *register* as *security* for the payment of his fees, and the petitioner is rendered liable to an execution on the part of the register in case of deficiency of assets for the payment of his fees. It is apparent that the compensation of the register is abundantly secured. The clerk and marshal do not appear to be so well provided for. The 47th section further provides, that "before any dividend is ordered, the assignee shall pay out of the estate to the messenger (that is, the marshal) the following fees, and no more," as there specified. And "for cause shown, and upon hearing thereon, such further allowance may be made as the court in its discretion may determine." I presume this is in reference to the marshal's fees alone.

The section concludes with this provision: "The enumeration of the foregoing fees (that is, all the fees enumerated) shall not prevent the judges (of the supreme court), who shall frame general rules and orders in accordance with the provisions of section 10 from prescribing a tariff of fees for all *other services of the officers of courts* of bankruptcy, or from reducing the fees prescribed in this section in classes of cases to be named in the rules and orders." The act classes registers with clerks and marshals as officers of the courts. In pursuance of said last provision of the section, the judges ordered by Rule 30, that additional fees should be allowed clerks and registers for services not enumerated in the act. And by Rule 29 it is ordered that "the fees of the register, marshal, and clerk shall be paid or secured *in all cases* before they shall be compelled to perform the duties required of them by the parties requiring such service." The fees of the register, as before seen, are to be secured by a deposit of fifty dollars with the clerk; but there being no security provided for in the law for the payment of the fees of clerks and marshals, no doubt, induced the judges to adopt Rule 29.

It is claimed that registers are entitled to be paid in advance the fifty dollars directed to be deposited with the clerk in each case. The act does not direct the manner or the

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time of disbursing the fifty dollars, but expressly directs the deposit to be made for the security of the registers' compensation. In a great majority of cases registers' fees cannot approximate the sum of fifty dollars. Where there is no estate for distribution, there will be but few if any debts proven, and no meeting of creditors to appoint assignees, and no examination of the bankrupt. The appointment of an assignee and subsequent proceedings will be mere matters of form. The legislature did not contemplate that registers should be paid in advance the whole amount of fifty dollars, in cases where by the fee bill not half or probably not the quarter of that sum could be earned. Rule 12 orders that "every register shall keep an accurate account of his travelling and incidental expenses, and those of any clerk or other officer attending him in the performance of his duties, in any case or number of cases which may be referred to him, and shall make return of the same under oath, with proper vouchers (where vouchers can be procured), on the first Tuesday in each month; and the marshal shall make his return under oath, of his actual and necessary expenses in the services of any warrants addressed to him, and for custody of property, publication of notices, and other services," &c. If the fifty dollars were payable to the register, or any part of it, in advance of services performed, this rule would be unnecessary, unless to enable him to have execution or an order for payment out of the estate, for excess of fees over the fifty dollars.

In pursuance of the concluding sentence of section 47, that the enumeration of the foregoing fees shall not prevent the judges from reducing the fees prescribed in this section in classes of cases to be named in their rules and orders; by Rule 30 the following order is made: "In cases where the debtor has no means, and makes proof to the satisfaction of the court that he is unable to pay the costs prescribed by the act and these orders, the judge, in his discretion, may direct that the fees and costs therein shall not exceed the sum of (fifty dollars) required by the act to be deposited with the clerk." This rule is a reduction of fees, and contemplates a

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distribution of the sum deposited with the clerk amongst the register, marshal, and clerk — otherwise the marshal might be required to advance money to pay for advertisements, notices, and postage, and he and the clerk might be compelled to perform their official duties without compensation.

vii I think the law and the orders * contemplate a regular taxation of all the fees and disbursements in each case by the clerk, under the direction and control of the court or judge. The sum deposited with the clerk as security for register's fees, or such portion as may be necessary, will, in ordinary cases, be appropriated, upon such taxation, to the register in the first place. In cases where a bankrupt is relieved by order of the court from making further payment of fees, the fifty dollars will be distributed *pro rata* to the register, marshal, and clerk. In ordinary cases any surplus of the fifty dollars will be ordered returned to the party, as applicable to any unpaid fees of marshal or clerk. The sum of fifty dollars is not a sum in court, but is deposited with the clerk, an officer of the court, where it will remain until disbursed under the supervision of the court. This is not a fund in court for general distribution amongst creditors.

By Rule 29 "the court may order the whole or such portions of the fees and costs to be paid out of the fund in court in such cases as shall seem just. Upon a taxation of the costs and fees, after a final discharge or decree in any case, the court may order the whole or a portion thereof advanced by the party to be paid or refunded out of the fund made of the estate, which is required to be paid into court and deposited in a bank according to the rules."

Printers' fees are chargeable according to the United States fee bill.

In re James W. Seymour.

U. S. DISTRICT COURT, S. D. NEW YORK.

R. deposited goods with S. in New Orleans in 1860, for sale on commission. S. did not account therefor, and was adjudged bankrupt in Louisiana, on his own petition, in June, 1867, and mentioned his debt to R. in his schedules. R. sues S. in May, 1867, for damages, in New York courts, and obtained judgment, and in September, 1867, while S. was in New York city, caused his arrest. S. sued out a writ of *habeas corpus*, to be discharged by the bankruptcy court, on the ground that the debt was provable and dischargeable in bankruptcy. *Held*, that the debt was created while S. acted in a fiduciary character, and was not dischargeable in bankruptcy.

Rule 27 G. O. only applies to the court in which bankruptcy proceedings are pending. Prisoner remanded.

Continued
 18 B. R. 24
 8 B. R. 212
 15 B. R. 489
 17 B. R. 102

*In re JAMES W. SEYMOUR, on habeas corpus.*¹

BLATCHFORD J. In this case the petitioner, James W. Seymour, is in the custody of the sheriff of the city and county of New York. The sheriff returns to the writ that he arrested Seymour and took him into custody on the 3d of September, 1866, by virtue of an order of arrest issued by a justice of the superior court of the city of New York, under the Code of Procedure of the State of New York, in a civil action in that court, wherein Constantine Rosswog was plaintiff, and the petitioner was defendant; that Seymour remained in his custody under said order until the 22d of September, 1866, when he was discharged on bail; that on the 3d of July, 1867, his bail surrendered him into the custody of said sheriff, in exoneration of themselves as his bail; that the sheriff thereupon received and thereafter held and retained Seymour in his custody by virtue of such surrender; that on the 20th of July, 1867, an execution against the person of Seymour in said action was duly issued to said sheriff, of which execution a copy is annexed to the return; that the original execution has been returned to the court from which it was issued, and that the debt embraced in the judgment set forth in the execution was created by the fraud or embezzlement of Seymour, or by his defalcation while acting in a

¹ Cited in *Hazelton's case*, 2 N. B. R. 12, quarto; in *Wright's case*, Ib. 58; *Kimball's case*, Ib. 75; and *Rosenberg's case*, Ib. 82.

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fiduciary character. The execution is issued from the said superior court, and recites that a judgment was rendered on the 18th day of May, 1867, in an action in said court, between said Rosswog, plaintiff, and said Seymour, defendant, in favor of Rosswog against Seymour for \$5,592.74, and that the said sum, with interest from May 8, 1867, is actually due thereon, and that an execution against the property of Seymour has been duly issued to the sheriff of the proper county, and returned unsatisfied. It then commands the sheriff to arrest Seymour and commit him to the jail of the county of the sheriff until he shall pay the judgment or be discharged according to law.

In connection with the petition for this writ, and the writ itself, and the return thereto, Seymour has presented to this court a petition praying for his discharge from imprisonment and arrest during the pendency of proceedings in bankruptcy which he has instituted, and that all proceedings in the state court be stayed until the termination of said proceedings in bankruptcy. The petition shows that the suit in the superior court was commenced August 22d, 1866; that Seymour was held to bail under an order of arrest in the suit in the sum of \$5,000; that on the 24th of June, 1867, Seymour filed his voluntary petition in bankruptcy in the district court of the United States for the district of Louisiana, praying for his discharge under the bankruptcy act of March 2, 1867; that on the 20th of July, 1867, Seymour was duly adjudicated a bankrupt in the court of Louisiana; and that the indebtedness to Rosswog is included in the schedule to the petition in bankruptcy, and is provable under the act. Annexed to the petition is a copy of the judgment roll in the suit in the superior court. By this it appears that the cause of action in the suit was that in 1860 Rosswog, a manufacturing jeweller in New York, deposited with Seymour, then a wholesale jeweller in New Orleans, certain manufactured jewelry of which a list is set forth, with values, amounting in worth to \$3,971.75 that the jewelry was deposited with Seymour for sale on commission, the proceeds to be remitted to Rosswog as soon as

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the goods should be sold, less five per cent. for cash, and if the same should be sold on a credit, then Seymour should remit to Rosswog good business notes for the same, indorsed by Seymour; that Seymour received the goods for sale on those conditions, but had never rendered any account of them or paid for them; that Rosswog had demanded the goods from Seymour, and Seymour had refused to deliver them; that Seymour had sold many of the goods and received the price thereof, but failed and refused to pay over the same to Rosswog; and that Seymour had converted the goods or proceeds thereof to his own use. The complaint claimed damages in \$12,000. The answer of Seymour denied all the material allegations of the complaint, and denied his indebtedness in any sum whatever. The case was tried before a jury, May 10, 1867, and a verdict was rendered for the plaintiff for \$5,242.90, upon which judgment was perfected in the sum of \$5,592.74, May 18, 1867, which included an extra allowance, costs, and interest in the verdict.

The answer of Rosswog to the petition of Seymour shows that Rosswog has not proved his claim against Seymour in the bankruptcy proceedings, and claims that the debt was created by Seymour while Seymour was acting in a fiduciary character towards Rosswog, and that no proceedings in bankruptcy affect the debt or the remedies of Rosswog therefor.

It is claimed on the part of Seymour that the debt in question is not within the enumeration of debts in the 33d section of the bankruptcy act which cannot be discharged under the act. That section declares as follows: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under the act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt." The 26th section of the act provides as follows: "No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him."

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The purport of this provision of the 26th section is, that no person should be held under arrest, or suffer imprisonment in any civil action, during the pendency of proceedings in bankruptcy by or against him, whether he is first put under arrest after the commencement of the proceedings, or is imprisoned at the time the proceedings are commenced, unless the action is founded on some debt or claim from which his discharge in bankruptcy would not release him; but that he may, notwithstanding the pendency of proceedings in bankruptcy by or against him, be held under arrest and suffer imprisonment in a civil action, if such action is founded on a debt or claim from which his discharge in bankruptcy would not release him.

The question therefore arises, whether the debt due to Rosswog is one from which Seymour's discharge in bankruptcy would release him. In other words, is such debt, within the language of the 33d section of the act, a debt created by the fraud of Seymour, or by his defalcation while acting in a fiduciary character. According to well settled authority such debt was created by the defalcation of Seymour while acting in a fiduciary character. The depositing of the property with Seymour for sale on commission for Rosswog, established a fiduciary relation between them, and charged Seymour with the execution of a trust on behalf of Rosswog, under which it was his duty either to return the property to Rosswog or to remit to him its proceeds. His failure to do so was a defalcation by him while acting in such fiduciary capacity, and such defalcation created the debt to Rosswog. Such debt will, therefore, not be discharged by the discharge of Seymour in bankruptcy, and consequently such debt is one for which, in a civil action founded on
viii · it. Seymour may be arrested * and held under imprisonment during the pendency of proceedings in bankruptcy.

The case of *Chapman v. Forsyth*, 2 How. 202, only decides that a balance due from a factor to his principal for goods of the principal sold by the factor is not a fiduciary debt within the meaning of the bankruptcy act of 1841. The

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act of 1841 excluded from its benefits "all persons owing debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any *other* fiduciary capacity." The supreme court held in *Chapman v. Forsyth* that a discharge under the act of 1841 did not release the bankrupt from any such debts, and that no debt fell within the description of a debt created by a defalcation while acting in any *other* fiduciary capacity, unless it was created by a defalcation while acting in a capacity of the same class and character as the capacity of executor, administrator, guardian, and trustee. The court held that the language of the act of 1841 was not broad enough to include every fiduciary capacity, but was limited to fiduciary capacities of a specified standard or character. That was clearly so under that act. But in the act of 1867 the language seems to have been intentionally made so broad as to extend to a debt created by a defalcation of the bankrupt, and while acting in *any* fiduciary capacity, and not to be limited to any special fiduciary capacity. Therefore, under the act of 1867, no debt created by the defalcation of a bankrupt while acting in any fiduciary capacity will be discharged, and a bankrupt can be imprisoned during the pendency of proceedings in bankruptcy by or against him on a civil action founded on any such debt.

The 21st section of the bankruptcy act does not apply to the present case. As Rosswog has not proved his debt in the bankruptcy proceedings by Seymour, he is not within the inhibitions imposed by that section on a creditor who proves his debt or claim. There is another provision of the 21st section which is as follows: "No creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the termination of the court in bankruptcy, on the question of the discharge, provided there be no unreasonable delay on the

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part of the bankrupt in endeavoring to obtain his discharge ; and provided also that if the amount due the creditors is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid." This provision cannot be regarded as applying to any suit or proceedings brought to collect, or enforce, or satisfy any debt which would not be discharged by a discharge granted under the act. There can be no reason for staying any suit or proceedings to collect, or enforce, or satisfy a debt until the question of the debtor's discharge shall have been determined by the court, if the discharge, when granted, will not discharge the debt. The statute ought not to be interpreted as extending to the staying of any suit or proceedings to collect, or enforce, or satisfy a debt which cannot be discharged if any other interpretation is consistent with the language. If the reason for the stay ceases, the presumption is that the legislature did not intend that there should be a stay. No greater scope can be given to the suits and proceedings, and debts named in the provision, than is given to the discharge by the act, and as the act does not extend to the effect of a discharge to the releasing of a debt created by the defalcation of the bankrupt while acting in a fiduciary character, this provision of the 21st section cannot be regarded as referring to the staying of any suit or proceedings to collect, or enforce, or satisfy such a debt. It was urged that the 27th Rule of the General Orders in Bankruptcy provides for the release of Seymour, although the act might not in terms apply to the case. That rule provides as follows : " If the petitioner during the pendency of the proceedings in bankruptcy be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable, he shall be discharged, if not, he shall be remanded to the custody in which he may lawfully be."

In re Patrick C. Devlin & John Hagan.

Without deciding whether this rule can in any case be construed as extending the exemption from imprisonment further than it is extended by the act itself, it is sufficient to say that the rule applies only to the court in which the proceedings in bankruptcy are pending. In the present case the proceedings in bankruptcy are not pending in this court, and, therefore, the rule does not apply to the court. If Seymour was restrained of his liberty under the process of a state court in violation of any law of the United States, this court would, under the provisions of the act of February 5, 1867 (14 U. S. Statutes at Large, 385), have power to release him on *habeas corpus*. That act extends the power of this court to such a case.

The result is that Seymour must be remanded to the custody of the sheriff, and the prayer of his petition must be denied.

Thomas Dunphy, for Seymour; *Robert B. Roosevelt*, *Geo. F. Noyes*, & *Daly*, for Rosswog and the sheriff.

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The warrant of adjudication directed the marshal, as messenger, to publish, serve, or mail notices to creditors for first meeting thereof on July 24. The marshal returned that he had made first publication, and mailed notices July 15. The register decided the notice insufficient, and adjourned the day of meeting to August 8, following. On that day the marshal returned that he had sent notices by mail, to creditors, July 29, but no further publication had been made. *Held*, That no sufficient notice had been given before the first return day, and the register acted properly in adjourning the day of meeting. That on the second return day no publication appeared to have been made, and the register should have again adjourned the day of first meeting to allow such publication to be made.

In re PATRICK C. DEVLIN & JOHN HAGAN.¹

BLATCHFORD J. In this case, on the 10th of July, 1867, the register issued a warrant to the marshal, directing him

¹ Cited in *Pulver's case*, *post*, p. 55.

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to publish twice in each of two newspapers, the notice required by law, that a meeting of the creditors of the bankrupts to prove their debts, &c., would be holden at a court of bankruptcy, to be held before the register, July 24, 1867. The marshal was also directed by the warrant to serve written or printed notice forthwith, either by mail or personally, on all creditors upon the schedule filed with the bankrupt's petition, at least ten days before the meeting, in the form required by law. On the 24th of July, 1867, the marshal made return that by virtue of the warrant he caused the notice therein ordered to be published by advertisement twice in each of the newspapers mentioned, the first publication having been on the 15th of July, 1867, and also that on the 15th of July, 1867, he sent by mail to the creditors and others named in the warrant, a copy of the notice required thereby to be sent to or be served upon them, and that all of the notices were according to the directions set out in the warrant. On the same day, July 24, 1867, it appearing to the register by said return to said warrant, that notice to the creditors had not been given ten days before said appointed meeting as required in the warrant, he adjourned the meeting and directed that a new notice should be given by the marshal, as required in the warrant, that the meeting of creditors would be held on the 8th of August, 1867. On August 8th, 1867, the marshal returned that by virtue of the warrant he had sent by mail to the creditors and others named in the warrant, a copy of the notice required thereby to be sent to them, on the 29th of July, and that all of the notices were according to the directions of the warrant. The return did not show that any further publication had been made of the notice. On these facts the register certifies that the following questions arose: 1. Whether the publication of the notices in the newspapers named within the period of ten days immediately preceding the return day of the warrant was sufficient publication within the meaning of the act. 2. If such publication was sufficient for the first return day, was it necessary again to publish for the adjourned day or second

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return day, in addition to the mailing or personal service of notice to creditors. The register also states that the parties requested that the said question should be certified to the judge for his opinion thereon.

The publication of the notices in the newspapers named within the period of ten days immediately preceding the return day of the warrant, was not sufficient publication within the meaning of the act. The 11th section of the act requires that the warrant to the marshal shall authorize him *forthwith* to publish notices in the newspapers specified, and to serve notice, by mail or personally, on the creditors and the other persons specified, and that the notice shall state that a meeting of the creditors to prove their debts and choose one or more assignees will be held at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same. The warrant, Form No. 6, directs that the first publication of the notice shall be made *forthwith*, and that the notice shall *be served ix on the creditors, and at least ten days before the appointed meeting. The good sense of all this is that the publication must be commenced and the notices be served as soon as conveniently practicable after the issuing of the warrant, but that, at all events, to make the proceedings regular, the publication must be completed before the commencement of the period of ten days immediately preceding the return day of the warrant, and the notices must be served on the creditors before the commencement of such period of ten days.

In the present case there has been, at the time of the meeting of July 24, 1867, no proper publication of notice, and no proper service of notice. Under section 12 of the act, it was, therefore, proper for the register to adjourn the meeting to a day and hour to be then and there fixed by him, and to direct that a new notice should be given by the marshal, as required in the warrant, that the meeting of the creditors would be held on such adjourned day and hour. The 12th section says, that if at the meeting held in pursuance of the notice, it appears that the notice to the creditors has not

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been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required. The expression, "notice to the creditors" in this 12th section, means the notice required by the 11th section to be published as well as the notice required by that section to be served, and the word "given," wherever used in the 12th section, means *published*, as well as *served*.

On the adjourned day, the 8th of August, 1867, it appeared that the necessary notice to the creditors has been served as required, that is, ten days before the adjourned meeting, but it did not appear that the notice had been properly published. On such adjourned day it was proper for the register to again adjourn the meeting, and direct the notice to be published, the publication to be completed at least ten days before the new adjourned day, the service on the creditors having been properly made and standing good. If the publication had been sufficient for the first return day, it would not have been necessary to publish again for the first adjourned day, or for the second return day, but it would only have been necessary if the service on the creditors had not been properly made in time before the first return day, to require the service of new notice on the creditors.

The clerk will certify this decision to the register, &c.

U. S. DISTRICT COURT, S. D. NEW YORK.

Creditors petitioned to have copartnership debtors adjudged bankrupts on the ground that they had made preferential assignments, and confessed judgment to other creditors; debtors made denial, and demanded jury trials, which were ordered. Injunction had issued at the instance of one of the creditors, restraining proceedings under the assignment and upon the said judgments.

On motion to vacate said injunction —

Held, It would not be dissolved until the question of the bankruptcy of the debtors should be determined.

It being alleged that the property was perishable —

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Held, That sale thereof for benefit of all concerned, could not be ordered until it should be in the possession of the marshal as messenger.

In re HENRY F. METZLER & THOMAS G. COWPERTHWAITHE.

BLATCHFORD, J. In this case two petitions have been filed by creditors of Metzler and Cowperthwaite to have them adjudged bankrupt. One was filed on the 18th of July, 1867, by Wilson, Watrous & Co., and the other on the 23d of July, 1867, by C. Cowles & Co. On the return day of the orders to show cause, August 6, 1867, the debtors appeared and denied that they had committed the acts of bankruptcy set forth in the petitions, and demanded trials by jury, and such trials were ordered.

In the case of the petition of Wilson, Watrous & Co., an order was made by the court, July 22, 1867, restraining the debtors and one Hervey C. Calkin, and the sheriff of the city and county of New York, and all persons acting under their authority or control, from selling, assigning, disposing of, or removing any of the goods, chattels, or property of the debtors or of either of them, not excepted by the bankruptcy act, from the operation thereof, and from any interference therewith, until the further order of the court, and ordering a writ of injunction to issue to that effect.

In the case of the petition of C. Cowles & Co., an order was made by the court, July 24, 1867, restraining the debtors, and Calkin and the sheriff, and also George E. Cowperthwaite and John N. Blasi, until the return of and decision upon the order to show cause, from making any transfer or disposition of any of the property of the debtors, either individually or jointly, or as copartners, not excepted by the bankruptcy act from the operation thereof, and from any interference therewith; and from making any transfer or disposition of any of the aforesaid property assigned to Calkin or levied upon or seized by the said sheriff, and from any interference therewith except such property as may be excepted from the operation of the act.

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The act of bankruptcy alleged in the petition of Wilson, Watrous & Co. was, that the debtors on the 26th of June, 1867, being bankrupt and insolvent, made to Calkin an assignment of certain property, and thereby gave a preference to certain of their creditors over the petitioners and other creditors. By a deposition filed with the petition, it appears that the assignment was in writing and was signed by the debtors, and duly acknowledged by them, and bore date June 26, 1867, and was an assignment of the property covered by it in trust, to sell it and with the proceeds to pay certain creditors named in three specified classes in preference to the creditors not named; that the assignment was recorded in the office of the clerk of the city and county of New York, that it contains a clause of the acceptance of the trust by Calkin, and was signed and acknowledged by him; and that the assignee took possession of the property covered by the assignment. By the petition of Wilson, Watrous & Co., filed July 18, 1867, on the application for an injunction, it appears that on the 12th of July, 1867, Calkin, the assignee, commenced an action in the supreme court of New York against the debtors to recover an alleged indebtedness due to him individually of \$3,500; that on the 15th of July, 1867, the debtors appeared in the action by attorney, and served on the plaintiff's attorney a notice of appearance in writing, and a consent in writing that the plaintiff might take judgment for \$3,500, and interest on \$1,000 from May 15, 1867, besides costs; that on the same day the offer was accepted in writing, and a judgment was entered against the debtors in favor of Calkin for \$3,531.60 damages and costs; that on the 18th of July, 1867, an execution was issued to the sheriff of the city and county of New York to collect the judgment, and that the sheriff, under the executions levied on all the property of the debtors included in the assignment to Calkin, and advertised the same for sale at auction on the 24th of July, 1867. By a deposition filed with the last named petition it appears that the debt so prosecuted by Calkin was one provable under the bankruptcy act.

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The acts of bankruptcy alleged in the petition of C. Cowles & Co., were the same assignment to Calkin of the 26th of June, 1867, and the suffering by the debtors their property to be taken by legal process on the 15th of July, 1867, under the said judgment in favor of Calkin, and under a judgment in favor of George E. Cowperthwaite for \$2,519.94 against the debtors, obtained upon an offer made by the debtors to allow it, and the suffering by them their property to be taken on legal process on the 20th of July, 1867, under a judgment in favor of John N. Blasi, for \$1,855.30 against the debtors, obtained upon an offer made by the debtors to allow it, the whole being done with intent to give the judgment creditors a preference over the petitioners and other creditors, and to defeat and delay the operations of the bankruptcy act. It further appears by the petition of C. Cowles & Co. for an injunction, that the sheriff had, under executions issued to him in all three of the judgments, taken possession of the property assigned to Calkin and advertised it for sale on the 24th of July, 1867.

A motion is now made on behalf of Calkin and George E. Cowperthwaite to dissolve the said injunctions. The affidavits in support of the motion set forth, that on the 28th of March, 1866, the debtors and the judgment creditors, Calkin and George E. Cowperthwaite, entered into a written agreement, whereby the former sold to the latter their interest on all their firm property, and in an article known as a patent spring leaping horse, and all property then belonging to the firm or that they might thereafter be in possession of during the continuance of the agreement, and the latter agreed to loan to the former, the note of each of the latter for \$1,500, and also agreed each to discount and keep discounted the firm note of the former for \$1,000; and whereby it was agreed that in case the former wished to terminate the agreement they could do so by returning to the latter the notes, and paying a royalty to the latter of twenty-five cents for each leaping horse sold by the former from the date of the agreement until the expiration of the patent; and whereby it was

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agreed that if the latter wished to terminate the agreement they could do it by demanding from the former the return of all considerations thereinbefore mentioned, and that if the former refused to make such return or indemnify or secure the latter to their satisfaction from all possible loss and damage, then the latter might take possession of all property of the former thereinbefore * mentioned under
x said bill of sale, or they could call upon and demand from the former a new bill of sale, confession of judgment, or such other security as they might deem best for their safety from loss or damage ; and whereby the former agreed, under such circumstances, to execute such bill of sale or confession of judgment, when so called upon ; that in pursuance of such agreement each of the latter loaned to the former the full amount in money and credits of \$2,500, and Calkin, on the 15th of May, 1867, loaned to the former for use in their business the further sum of \$1,000 in money ; that Calkin afterwards demanded payment of this \$1,000, but the former confessed themselves not able to pay it, and offered to make an assignment of all their firm property to Calkin for the benefit of their creditors, and to place the claim of Calkin and the claim of George E. Cowperthwaite in the second class of preferred claims ; that Calkin, after consulting counsel, agreed to the assignment and consented to act as assignee ; that the principal business of the debtor was the making of the patent horse ; that the patent had been assigned to Calkin and George E. Cowperthwaite ; that it was the belief of Calkin that it would be for the interests of the creditors of the firm that the assignment should be made, and an arrangement entered into by which a large amount of detached and unfinished parts of said leaping horse, of no value in their then condition, should be united and finished in a proper manner, and thus made available at their true value as a part of the assets of the firm ; that at the time the assignment was made George E. Cowperthwaite was absent, and he afterwards refused his assent to it ; that thereupon Calkin consented to the steps which were afterward

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taken in the matter of his claim against the firm ; that on the 10th of July, 1867, Calkin and George E. Cowperthwaite served a written notice on the firm, demanding a return of all the securities made or indorsed by them and placed in the hands of or discounted for the firm, and that the agreement from the date of the giving up of such securities should be terminated ; that the firm declined to give up the securities, and said that it was out of their power so to do ; that on the 11th of July, 1867, Calkin and George E. Cowperthwaite served on the firm a written notice, stating that the assignment was not regarded by them as a sufficient security or as meeting the terms of the agreement ; and that Calkin had been advised that in view of the bankruptcy act the validity of the assignment was at the best involved in great doubt, and did not feel justified in taking any further proceeding as assignee, and demanding that the firm confess a judgment to Calkin and George E. Cowperthwaite severally for the amount due to each of them on the contract, according to its stipulations ; that the firm refused to comply with such demand, and thereupon Calkin commenced an action against them in the supreme court of New York for \$3,593.75, and the defendants admitted the whole amount to be due except \$93.76, and offered to let Calkin take judgment for the amount so admitted, which he did under the advice of his counsel ; that he afterwards caused an execution to be issued against the firm, and their goods and chattels to be attached thereon ; that it is the sale under this execution which is prohibited by the injunction ; that the contract was, when made, in accordance with the laws of New York, and Calkin acted in good faith, in the endeavor by its terms, to secure the payment of his debt ; that George E. Cowperthwaite insisted on the payment of his claim, according to the terms of the contract, which, being refused, he brought a suit against the firm for its amount (\$2,593.75), and the firm having offered to allow judgment for the claim less \$93.75, he accepted the offer and took judgment accordingly, and caused an execution to be issued thereon, which

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was levied on the goods and chattels of the firm, and is the same under which proceedings have been enjoined by this court, and that he has not sought any remedy other than such as is justified by the terms of the contract, and that the same is in accordance with the laws of New York and the usages of the courts.

In reply to these affidavits in support of the motion, it is shown that the indebtedness of the firm to Wilson, Watrous & Co. arose for lumber sold and delivered to the firm between February 10, 1867, and May 2, 1867, to be used in its business, and delivered to it at its place of business in New York; that until the 19th of August, 1867, Wilson, Watrous & Co. had no knowledge of the existence of the agreement of March 28, 1866; that C. Cowles & Co. never had any knowledge or information of said agreement until after the entry of the three judgments against the firm; and that the indebtedness of the firm to C. Cowles & Co. arose for hardware sold and delivered by them to the firm since January 1, 1867, to be used in the manufacture of goods in the business of the firm.

It is urged as a ground for dissolving the injunctions, that the assignment to Calkin and the obtaining of the judgment against the firm were valid transactions and not void under the bankruptcy act, and that they were merely in fulfilment of a previous agreement, and were the effect of measures taken by the creditors. These transactions are the very acts of bankruptcy alleged in the original petitions of the creditors, and the very acts, the commission of which is denied by the debtors, and in respect to which they have demanded, and the court has ordered trials by jury.

The injunctions were granted under the 40th section of the act. The intent of the provisions of that section manifestly is, to give the court authority in a case of involuntary bankruptcy, when an order is issued requesting the debtor to show cause why he should not be declared a bankrupt, to prevent, by injunction, any interference with the debtor's property until a decision shall be arrived at, whether the

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debtor is or is not to be adjudged a bankrupt. In the present case no such decision has been arrived at. The decision is suspended by the act of the debtors in denying that they have committed the act of bankruptcy alleged, and in demanding a trial by jury. The same facts which constituted sufficient ground for issuing the order to show cause, also furnish sufficient reasons for issuing the injunction. The court will not, on a motion of this kind, on affidavits, dispose of what are really all the issues involved in the proceeding. If the injunctions should be dissolved, and the debtors should afterwards be adjudged bankrupts and an assignee of their estate be appointed, the court would have dissolved the injunctions on the same state of facts on which the debtors were adjudged bankrupts. Substantially the whole of the property of the debtors would have passed to the three preferred creditors, leaving to the assignee only an inheritance of litigation; and the very object of the remedy by injunction given by the 40th section would have been defeated.

Without deciding, therefore, definitively, whether the transactions set forth are or are not void under the bankruptcy act, it is sufficient to say that there is probable cause for continuing the injunctions until it shall be decided whether the debtors are or are not to be adjudged bankrupts. Indeed, independently of anything contained in the agreement of March, 1866, the including in the judgment in favor of Calkin of the \$1,000 not provided for by that agreement would be a good ground for continuing the injunction in respect to that judgment, and the giving of the judgment to Blasi would be a sufficient ground for granting an injunction as respects any property levied upon under an execution on that judgment.

It is represented that the property levied on under the executions in the judgments and about to be sold is perishable, and that it is for the interest of all parties that it should be sold and preserved for whoever may be entitled to the proceeds. But it is not proper to dissolve these injunctions, and thus allow the proceeds of the property to pass to

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the judgment creditors, to the exclusion of an assignee in bankruptcy, who may, in the end, be entitled to claim it. This court has no power to order the sale of the property as perishable at the present stage of the proceedings, unless it is in the possession of the messenger (Rule 22 of the "General Orders in Bankruptcy"), and it cannot come into the possession of the messenger until a warrant is issued under section 40 to the marshal to take possession of it provisionally. Such warrant cannot issue unless it appears that there is probable cause for believing that the debtor is about to remove or conceal his goods and chattels, or his evidences of property, or make a fraudulent conveyance or disposition thereof. But, the fact that this court has no power to order the sale of this property, at the present time, is no reason why it should not exercise the power which is expressly given to it of interposing by injunction to prevent any interference with the property until it shall be decided whether the debtors are or are not to be adjudged bankrupts.

The motion to dissolve the injunction is denied.

N. Cross, for the motion. *H. Sheldon*, for Wilson, Watrous & Co. *W. E. Curtis*, for C. Cowles & Co.

WHEN, on a creditor's petition, a trial by jury is had to ascertain the fact of the alleged bankruptcy, *it seems* that the jury may find the existence of the bankruptcy, though the petitioning creditor fail to move his debt before them. *Phelps v. Clasen* (Minn. C. C.), West. Jurist, 221.

i. * UNITED STATES COURT, S. D. NEW YORK.

On questions certified by register at the first meeting for the decision of the judge —

Held, 1. Only actual questions arising and existing on issues of law or fact in proceedings had, and not hypothetical questions, or questions in anticipation, or likely to arise, are proper to be certified for decision by the judge. So as

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to questions on points or matters arising in the course of proceedings, and upon the result of proceedings. Questions stated by consent, must be by parties in a special case upon proceedings actually had.

2. Where residences of creditors are stated in the schedule to be unknown, proof of due inquiry to ascertain the same must be produced by the bankrupt.
3. The term "residence" refers to the abode of the creditor, whose post-office address should be stated also in the schedules. Personal service may be ordered at the former, or service by mail at the latter. The statement of residence must be such as will insure notice by mail or service in person.
4. Where the warrant stated present residences as unknown, yet stated former residences of creditors, and the marshal returned notices mailed to such creditors, residences unknown,
Held, Such notice was good.
5. The marshal's returns of service of notices to creditors is *prima facie* evidence of due service, and conclusive until rebutted by proof *aliunde*; but if it appears from its face that due service has not been made, the first meeting must be adjourned for proper notice to be given.
6. The exact language contained in the warrant should be copied by the messenger into the notices to creditors to be served and published, but the register may disregard all immaterial variance, and omission in the notices of the former residence stated in the warrant.

In re JOHN PULVER.

BLATCHFORD, J. In this case the petitioner was adjudged a voluntary bankrupt July 6, 1867. On the same day a warrant was issued to the marshal. The return of the warrant, that is to say, the first meeting of creditors, was August 27, 1867. The register has sent to the court a certificate dated that day, stating that in the course of proceedings before him, thirteen questions arose, which are set forth in a statement annexed to the certificate, and that the questions were pertinent to the proceedings, and were stated on the part of the bankrupt. The register then goes on to state his opinion upon each of the thirteen questions, and concludes by saying that the bankrupt requested that the same should be certified to the judge for his opinion thereon.

It is manifest from the face of the statement annexed to the certificate of the register, that several of the questions stated are purely hypothetical, and did not arise in the course of the proceedings before the register. The meeting on the 27th of August was the first meeting of creditors. So far as

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appears, no creditor proved a debt, or attended, or was represented before the register. The only questions, therefore, which could properly come up before the register, were questions as to the petitions and schedules, and questions under the 12th section of the act, connected with the return by the marshal of the warrant and of his doings thereon, and as to whether the notice to the creditors had been given as required in the warrant. It is not proper for the register to certify to the court for decision every question which the bankrupt or any other party may choose to raise. The 4th and 6th sections of the act only contemplate the certifying of questions which actually arise. The questions which can be certified are: (1.) Any issue of fact or of law, raised and contested by any party to the proceedings; but it must be an issue actually raised and existing, and one which has arisen out of proceedings which have taken place, and not an issue likely to arise, or which may be raised thereafter. (2.) Any point or matter arising in the course of the proceedings, or upon the result of the proceedings, but it must be a point or matter which has arisen in the course of proceedings which have taken place, or a point or matter which has arisen upon and after the result of proceedings which have taken place, and not a point or matter likely to arise, or which may be raised thereafter, or after a result shall have been arrived at. (3.) Any question stated by consent by the parties concerned in a special case; but it must be a question to which there are two parties, and one which has arisen out of proceedings which have taken place. No other practice is sanctioned by the act, and any other practice would lead to a great waste of time, and to great delay and expense. Nothing is to be certified or decided except what is necessary to be decided to enable the case to progress properly. Questions which thus necessarily arise are to be decided as and when they thus arise, and are not to be anticipated. A register ought to hold parties strictly to this practice, and to refuse to certify any question except in accordance with it. Subject to these principles the questions certified in this case will be considered.

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The bankrupt sets forth eleven debts in his petition. In regard to debts Nos. 1, 2, 3, 4, 5, 7, 8, and 10, he states in his petition that he does not know the present residence of the creditors. In regard to debts Nos. 1, 2, and 4, he states in his petition where he thinks the creditors formerly resided. In regard to debts Nos. 3 and 10, he states in his petition where the creditors formerly resided, and in regard to debt No. 10, he further states therein that the creditor moved from his former residence to the State of Michigan, and that he had heard that he was dead. In regard to debts Nos. 1, 2, 3, 4, 5, 7, and 8, the warrant states that the present residences of the creditors are unknown. In regard to debts Nos. 1, 2, and 4, the warrant states that the petitioner thinks the creditors formerly resided in the places where the petitioner states he thinks he formerly resided; and in regard to debt No. 3, it states that he thinks the creditor formerly resided in the place where the petition states he formerly resided. In regard to debt No. 10, the warrant states as follows: "Did live in——Michigan; present residence unknown, if living." In the notices served by the marshal on the creditors, the residences of the creditors, in debts Nos. 1, 2, 3, 4, 5, 7, 8, and 10, are stated merely as "unknown." The marshal in his return to the warrant states, that on the 15th of July, 1867, "he sent by mail to the creditors and others named in said warrant, a copy of the notice required thereby to be sent to or served on them, and all of the said notices were, according to the directions, set out in said warrant." Upon these facts the various questions certified arise.

1. The question raised is, whether the bankrupt has in his petition stated, in a correct form, the residences of his creditors. He contends that he is not bound under the act to make more than ordinary inquiry as to the residence of the creditors, but is to give the facts according to the best of his knowledge, information at hand, and belief; and he refers to the provision of the 11th section of the act, which states that he "shall annex to his petition a schedule verified by oath

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. . . . containing a full and true statement of all his debts, and as far as possible to whom due, with the place of residence of each creditor if known to the debtor, and, if not known, the fact to be so stated, and the sum due to each creditor." In regard to this question, the register states that he is of the opinion that the statement by the petitioner of the residence of his creditors is substantially correct and sufficient; that the petitioner states the residences of creditors Nos. 1, 2, 3, 4, and 10, to be unknown to him at the time of filing the petition and schedules, and that his statement of their residences in previous years is surplusage; but that he thinks that the schedule should show that the petitioner has endeavored to ascertain the present residence of such creditors. I concur with the register in all these views.

The petition, Form No. 1, makes the petitioner swear that Schedule A "contains a full and true statement of all his debts, and (*so far as it is possible to ascertain*) the names and *places of residence* of his creditors." Rule 33 of the "General Orders in Bankruptcy" provides that "whenever a debtor shall omit to state in the schedules annexed to his petition, any of the facts required to be stated concerning his debts or his property, he shall state either in its appropriate place in the schedules, or in a separate affidavit to be filed with the petition, the reason for the omission, with such particularity as will enable the court to determine whether to admit the schedules as sufficient, or require the debtor to make further efforts to complete the same according to the requirements of the law." In view of the 11th section of the act, and of Form No. 1, and of Rule 33, whenever a debtor states that the residence of a creditor is unknown, he should show in the schedules, or in a separate affidavit, what efforts he has made to ascertain the present residence of the creditor, especially where he shows that he had or has information as to where the creditor once resided. The requirements of the law, as interpreted by the supreme court by Form No. 1, is that the place of residence of the creditor shall be stated so far as it is *possible* to ascertain it; and unless the debtor

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shows, under Rule 33, what efforts he has made to ascertain it, the register cannot determine, as he is required to do by Rule 33, "whether to admit the schedules as sufficient, or to require the debtor to make *further* efforts to complete the same according to the requirements of the law." This Rule implies clearly that the debtor must make efforts to ascertain the present residences of his creditors, and that he cannot satisfy the laws by reposing on the knowledge, the information at hand, and the belief which he may possess, and without making any effort to ascertain such present residences.

2. The second question stated is whether, in the case of a person having his place of business in one place, and his residence in another, both places being known, notices may be served personally, or by mail, on the person at either place, and whether if only one of the places is known * the notice may be served at that place. I do not see xii that any such question has arisen in this case, for it does not appear that any creditor has his place of business in one place and his residence in another. But the register states in his certificate in regard to the second question, that he is of opinion that the term "residence," as used in the act, was intended to refer to the *abode* of the creditor; that the post-office address of such creditor should also be stated, and that personal service may be ordered at the former, or service by mail at the latter. As the register considers these views as arising in the case on the facts stated, although I am not able to perceive how they arise on the second question, I have considered them, and concur with the register in his views.

3. The third question stated is, whether the word "residence," as used in the act (in reference to the residence of creditors caused to be stated in the schedules), has a broader significance than the mere idea of domicil, and covers both his place of business and domicil. I am unable to perceive how this is a practical question which has arisen in this case. But the register states that in relation to this question he is of the opinion that the act intends such a statement of resi-

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dence as will insure notice to the creditors, either personally or by mail. As the register regards this point as one which has arisen, I have considered it, and concur with him.

4. The fourth question stated is, whether the notice served by the marshal on one of the eleven creditors was defective, and whether, that being defective, the presumption was that the notices served on the other creditors were also defective. It is alleged by the bankrupt that the residences are stated by the petitioner in his petition according to the best of his knowledge, information, and belief; that the register, in issuing the warrant, frames the notice to be given to the creditors from the petition; that the marshal has not, in this case, followed the notice required to be given by him as directed by the warrant; that the register and not the marshal, frames the notice, and that the marshal has no option but to follow the notice as given in the warrant, and must follow that *verbatim*. The alleged discrepancy between the notice served and the warrant, is alleged to be that the notice in case of debts Nos. 1, 2, 3, 4, and 10, merely states that the residences of the creditors are "unknown," whereas the warrant contains in regard to those debts statements as to where the creditors formerly resided, in addition to statements that their present residences are unknown.

In regard to the fourth question, the register states that he is of opinion that the notice served is not defective; that the marshal did not err in stating the residence of creditors Nos. 1, 2, 3, 4, 5, 7, 8, and 10, to be "unknown;" that such was the necessary inference from the statements of their residences in the schedule and warrant; that the failure to serve notices upon such creditors (if there was such failure) was not error on the part of the marshal, and that the present residence of such creditors being unknown to him, he could not serve them with notice. The register is correct in these views.

5. The fifth question stated is, whether the notice served under the warrant being incorrect, there must not be an adjournment of the meeting of creditors, and a new notice given, as required under section 12 of the act. In regard to

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this question the register states that he is of opinion that the service of notices by the messenger not being incorrect, no new notices are required, nor any adjournment for that purpose. The register is correct in his premises and in his conclusion.

The sixth question is stated thus: "If the return of the marshal to the warrant, under Form No. 6, General Orders, is not conclusive proof of the regularity of service, &c., of notice (*vide in re William D. Hill, ante*, p. iv. August 12, 1867), how is the petitioner to know that the notices, &c., have been regularly served?" In regard to this question the register states that he is of the opinion that although the return of the messenger may not be conclusive for all purposes, it is authority sufficient for the register to proceed in the matter, and if from such return it appears that the notices have been duly served and published as directed in the warrant, the creditors served should proceed to prove their claims and elect the assignee; and that if the petitioner obtains further information as to the existence of other creditors not named in the schedules and warrant; or ascertains the actual precise residence of creditors which had been stated therein to be "unknown," such additional facts may be presented to the register by motion to amend, and for leave and time to notify such creditors. The register is correct in these views,

In the case of *William D. Hill*, I held that under sections 12 and 13 of the act, the return by the marshal as to the service of notice on the creditors is not conclusive. The notice required by the warrant must be given, and until due notice has been given by the marshal, the assignee cannot be chosen or appointed. But the marshal makes his return to the warrant, and from such return it appears whether the due notice required by the 12th and 13th sections has been given. If by such return it appears that due notice has been given, the proceedings go on. If by such return it appears that due notice has not been given, the meeting is adjourned. But such return is not conclusive on the register.

In re John Pulver.

For if, although the return states the due giving of notice, it satisfactorily appears that due notice has not been given, the meeting must be adjourned. If, however, the return shows that due notice has been given, and there is no satisfactory evidence *aliunde* to show that due notice has not been given, the return is *primâ facie* evidence of the due giving of notice, and is conclusive until rebutted; and is sufficient authority for the register to proceed and cause an assignee to be chosen or appointed.

7. The seventh question stated is, whether the notices being defective and incorrect, owing to the fault of the marshal, the petitioner should be compelled to pay the marshal's fees to remedy the defect and error. In regard to this question the register states that he is of the opinion that the notices not being defective and incorrect, and there being, therefore, no fault of the messenger, the question of the marshal's fees does not practically present itself, but that if additional creditors are discovered, or their precise residence ascertained, and new notices are given, the messenger is entitled to his additional fees for the service. The register is correct in his premises, and in his conclusions.

8. The eighth question stated is, whether it is for the register and judge of the district court to pass upon the materiality of the defects and irregularities in cases of defects in service or in notices, and whether their decision is conclusive. In regard to this question the register states, that he is of the opinion that the opinion of the district judge and of the register upon the materiality of defects and irregularities is not conclusive.

This question is a mere abstraction not arising in this case, and ought not to have been certified. I shall express no opinion in regard to it.

9. The ninth question stated is, whether if an irregularity in the services of notices on creditors by the marshal as messenger is not discovered at the first meeting of creditors, or until after the debtor is discharged, such irregularity will affect subsequent proceedings and the discharge. In regard

In re John Pulver.

to this question, the register states that he is of the opinion that if the irregularity in the service of notice is not discovered at the first meeting of creditors, but is discovered before the discharge of the bankrupt, such irregularity should be remedied by amendment, fresh service, and proceedings thereafter; but that if not discovered until after the discharge of the bankrupt, the certificate of discharge will be conclusive evidence in favor of the regularity of the discharge, and the discharge will not be invalidated unless the irregularity was of a grave and serious character, and shown to be wilful and fraudulent.

The question, too, is purely an abstract one, so far as this case is concerned, and has not arisen, and should not have been certified. No opinion is given in regard to it.

The tenth question is stated in these words: "Under section 12 of the act, in cases of a defect in service of notice on creditors, as required in the warrant, a new notice must be given as required. If the defect occurs in the publication of the notice required to be published, the service on the creditors being regular, a new notice must be published, but no new notices need to be served on creditors. If the defect is in the service of notice on creditors, the publication being regular, a new notice must be served on the creditors, but no new notice need be published."

The "new notice" to "be given as required," need only be given to remedy the defects or irregularities in the first notice, and nothing more. (*Vide Case of Patrick C. Devlin and John Hagan, ante*, p. viii.) In regard to this question the register states that he is of opinion that it was decided by the court in the case of Devlin and Hagan.

As there was not, in this case, any defect in either the publication or the service of notice, the question is not a practical one arising in this case, and no answer is given to it.

The eleventh question stated is, whether if notice fails to reach the creditor, owing to the miscarriage of notice, although properly addressed, the bankrupt will be prejudiced

In re John Pulver.

thereby. In regard to this question the register states that he is of the opinion that if the notice to creditors had been properly ordered, prepared, addressed, and mailed, but
xiii accidentally miscarries and fails * to reach the creditor, the bankrupt's discharge should not be prejudiced by such miscarriage ; and that if good faith, due diligence, and proper care are exercised, the discharge of the bankrupt shall not be invalidated.

As it does not appear that any notice in this case failed through miscarriage to reach a creditor, the question is purely a hypothetical one, and ought not to have been certified. No answer is given to it.

The twelfth question is stated thus: " In this case the notice required to be published (*vide* warrant) is correct, and no new one need be published. The notice required to be sent to or served on the creditors is incorrect, and a new one must be served." In regard to this question, the register states that he is of the opinion that in this case no new notice is required to be published or served on the creditors named, such notices and their publication and services having been correct. The register is correct in this view.

The thirteenth question stated is, whether the notices to be published and served on creditors by the marshal as messenger, must be exact copies of the notices as contained in the warrant. In regard to the question, the register states that he is of the opinion that the messenger should copy into the notices to be published and served, the exact language contained in the warrant, but that he does not deem an immaterial variance between the warrant and notice in reference to the residences of creditors, when not calculated to mislead, sufficient to invalidate the proceedings or the discharge. I concur with the register in the view that the messenger ought to copy into the notices to be published and served, the exact language contained in the warrant, but that the register may disregard an immaterial variance, when not calculated to mislead. In this case, the variance in regard to the residence of the creditors was immaterial, the

In re Freeman Orne.

statement in the schedules and warrant as to their former residences being surplusage.

The clerk will certify this decision to the register, Charles L. Beale.

September 2, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

Creditors filed proof of debts on an account current, a check, and a draft, and interest on the three items. Bankrupt objected and moved to strike out all over a specific sum set out in his schedules as due the creditor, claiming, (1.) That the draft was without consideration. (2.) That the account current was offset by claim against creditors for damages on breach of contract. (3.) That interest on matured debts could not be included in the amount proved against bankrupt's estate.

Held, That the register should investigate the question of the validity of the draft before proceeding further; that the claim for unliquidated damages by way of set-off should be properly included in the schedule of bankrupt's assets, and should be wholly disregarded in the proceedings for choosing an assignee; that interest might be proved on debts due and payable at the date of adjudication in bankruptcy under section 19.

In re FREEMAN ORNE.

BLATCHFORD, J. In this case, at an adjourned meeting of the creditors of the bankrupt, held August 27, 1867, for the proof of the debt, and the choice of an assignee, objections were raised by the bankrupt to a proof of debt by Benjamin Pope & Co. The proof was filed with the register, August 7, 1867, the amount of the claim being \$11,512.34, and the consideration an account current for goods, a check and a draft, and interest on the three items. The bankrupt requested the register to strike out of the amount of the claim all but \$2,000, which is the amount of the debt set out in the schedules filed with the bankrupt's petition as due to Benjamin Pope & Co., and to admit that firm to the right to vote for an assignee only to the amount of \$2,000.

The grounds assigned for this request were as follows: (1.) That upon the face of the claim, as stated, there was included interest upon the claim to the amount of \$1,798.18,

In re Freeman Orne.

which interest was added to the debt to make up the amount proved, and that interest on a matured debt cannot be included in the amount proved against a bankrupt's estate. (2.) That the draft for the amount of \$6,706.29, which formed a part of the claim, was given for the purchase of lumber contracted to be delivered by the creditors to the bankrupt; that the number was not delivered in pursuance of the contract nor accepted by the bankrupt, that thus the consideration of the draft had entirely failed, and that by reason of the failure of the creditors to fulfil the contract the bankrupt was entitled to damages, which set off against that portion of the claim which was in open account, would reduce the indebtedness of the bankrupt to Pope & Co. to \$2,000. The bankrupt offered to show these facts by his own examination under oath, and claimed that the creditors should be allowed to prove their claim only to the amount of \$2,000, or that the register should, under section 23 of the bankruptcy act, postpone proof of the claim until the assignee should be chosen. The register refused to strike out the claim and reduce it as requested, or to admit Pope & Co. to vote for an assignee only to the amount of \$2,000 of the claim proved. Thereupon the register, at the request of the bankrupt, adjourned the question into court for decision, and certified the foregoing statement. The register states in his certificate that in his opinion the proof of debt was sufficient to place Pope & Co. on the list of voters for assignee to the full amount claimed, and that the question as to whether the firm is entitled to interest on the full amount of the claims can properly come up on a future occasion and in another manner.

The original proof of debt is substituted with the certificate. The register also reports that the claim of Pope & Co. is not stated in schedule A to the debtor's petition at its full amount, with a statement in schedule B of the amount of the set-off claimed, as directed by the notes of instruction on Form 3 in schedule A, established by the supreme court, but is set out as \$2,000, "for merchandise."

In regard to the interest on the items of the claim included

In re Freeman Orne.

in the amount proved, I do not understand that the bankrupt claims that the items do not properly carry interest, or that interest would not be recoverable on the principal sums of the items, if the claims were to be put in suit against the bankrupt. The claim merely is that interest on a matured debt cannot be included in the amount proved against a bankrupt's estate.

The 19th section of the bankruptcy act provides "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract may be proved against the estate of the bankrupt." Under this provision, when a debt is in existence at the time of the adjudication of bankruptcy, but is not payable until afterwards, and the debt is one not bearing interest, or not renewing with interest, that is, is one on which, when it becomes payable, there will be payable merely the amount of the debt and not an additional sum for interest, in such case the debt may be proved for the amount of its worth or value at the time of the adjudication of bankruptcy until the time it becomes payable.

The time of the adjudication of bankruptcy is taken by the statute as the decisive time. The debt must exist at that time or it cannot be proved. If it exists then, but is not payable till afterwards, and is not a debt running with interest, that is, if, for instance, it is a promissory note for so many dollars given before the adjudication of bankruptcy, but not maturing till afterwards, then a rebate must be made, from its amount, of the interest on that amount from the time of the adjudication of bankruptcy to the time of the maturity of the note. It is equally clear that where the debt is one not only in existence at the time of the adjudication of bankruptcy, but payable before that time, and running with interest by its terms or character, so that the obligation of the debtor in regard to the debt will not be wholly discharged without payment of such interest, as well as of

In re Freeman Orne.

the principal, the statute intends that the debt shall be proved for the amount of the principal, and of the interest thereon to the time of the adjudication of bankruptcy. In the present case, as the items composing the claim were all of them due and payable from the bankrupt at the adjudication of bankruptcy, and as interest was running on all of them at that time, it was proper for the creditors to include in the amount proved interest to that time. Interest was included to August 7, 1867. Whether that was the time of the adjudication of bankruptcy, is not stated in the certificate. If, inadvertently, the interest has been computed for a wrong period, the register has, in the proof of debt, the means of correcting the error, and should alter the interest for the proper period. By taking the time of the adjudication of bankruptcy as the time for stating the present worth or value of the various debts proved, equal and exact justice is done to all creditors whose debts exist at that time, although they may have been or may be payable at various times and may carry different rates of interest.

The objection taken by the bankrupt in regard to the draft for \$6,706.29, consists of two branches. (1.) A claim that the consideration of the draft has entirely failed, and consequently that nothing is due on the draft. (2.) A claim that Pope & Co. are indebted to the bankrupt in an unliquidated sum of money for damages for breach of contract, that such sum must be set off against that portion of the claim of Pope & Co., which is an open account.

As regards the first branch, the 23d section provides, "that when a claim is presented for * proof before the election of the assignee, and the judge entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen." The 6th rule of this court provides that "if the register entertains doubts of the validity of any claim, or of the right of a creditor to prove it, and is of opinion that such validity or right

In re Freeman Orne.

ought to be investigated by the assignee, he may postpone proof of the claim until the assignee is chosen." The 22d section of the act provides that "the court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine under oath the bankrupt, or any person tendering, or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality or mistake." Under the 4th section of the act and the 5th Rule of the "General Orders in Bankruptcy," the register has power to take this evidence in regard to a debt or claim proved or sought to be proved. Now, in this case, it appears that the bankrupt offered himself for examination to show that the consideration of the draft had entirely failed; and I understand from the certificate that the register refused to receive evidence on the question of the failure of the consideration of the draft. In this the register erred. The purport of the 23d section is, that it is the duty of the register, when he entertains doubts of the validity of a claim or of the right of a creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, to postpone the proof of the claim until the assignee is chosen. When a question is raised as to the validity of a claim, and evidence is offered in regard to it, it is impossible for the register to come to a proper conclusion as to whether proof of the claim should be postponed without hearing the evidence offered, and then, if necessary, going on to exercise the power of investigation conferred by the 22d section. The register ought, therefore, before proceeding further in the case, to investigate the question raised as to the consideration of the draft and not allow the draft as a debt merely because the creditor has sworn to it, if evidence is offered to impugn it.

In regard to the claim for damages set up and claimed as a set-off against the open account, it ought, according to

In re Mortimer C. Cogswell.

Form 3 in schedule A to the petition, to have been stated in the bankrupt's schedule of property. The claim is an asset of the bankrupt of which the assignee, when appointed, will take cognizance, and it is not a claim which can, at this stage of the proceedings, be used by way of set-off against any part of the claims of Pope & Co. It is a wholly unliquidated claim, and its amount cannot now be arrived at. When it is put into the shape of a debt against Pope & Co., it may perhaps then fall within the purview of section 20 of the act, which provides "that in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid." It is a claim which must be wholly disregarded in the proceedings for the choice of an assignee.

The clerk will certify this decision to the register, James F. Dwight.

September 2, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where no creditors attend on the day fixed for the first meeting, the register may appoint an assignee under the provisions of section 13.

In re MORTIMER C. COGSWELL.

BLATCHFORD, J. In this case the register, at the request of the bankrupt, has certified the following question for the opinion of the judge: When no creditor attends at the place and time specified in the warrant and notice for the first meeting of creditors, does the law provide for or require the appointment of an assignee of the bankrupt's estate? The register in his certificate says, that there is not any provision of the act providing for the appointment of an assignee where there is not a meeting of creditors; that the only case in which a register is expressly authorized to appoint an assignee is where no choice is made by the creditors at the first meeting (section 13); that if there is not a meeting

In re Mortimer C. Cogswell.

this case does not occur; that a meeting is an indispensable condition of this power; that the justices of the supreme court seem to have so regarded the law, not having prescribed a form for an appointment by a register except where no choice is made by the creditors at the meeting. (Form No. 11.) That the 23d and 29th sections of the act, however, clearly contemplate an assignee in every bankruptcy; that by necessary implication, there must be a power to appoint; that in the case under consideration, as the proceeding is before a register, he must possess the power to make the appointment, and that the opinion of the register, therefore, is, that in the case mentioned in the question, the law does provide for and require the appointment of an assignee of the bankrupt's estate.

The register is correct in his conclusion that in case no creditor attends at the place and time specified in the warrant and notice for the first meeting of creditors, the law provides for and requires the appointment of an assignee of the bankrupt's estate. If the register attends at the place and time specified in the warrant and notice for the first meeting of creditors, and no creditor has proved a debt, the meeting is held, within the purview of the act, as fully and effectually as if debts had been proved and creditors had attended or been represented at the meeting, and the contingency happens which the 13th section speaks of, namely, the contingency that no choice is made by the creditors at the meeting. If creditors have proved their debts and attend or are represented, but fail to choose an assignee, then no choice is made by the creditors. If no creditor has proved a debt, so that no creditor has a right to vote in the choice of an assignee, then equally there is no choice of an assignee made by the creditors. In either case the judge, or if there be no opposing interest, the register, is to appoint one or more assignees.

The clerk will certify this decision to the register, Isaac Dayton, Esq.

September 6, 1867.

In re John Bellamy.

U. S. DISTRICT COURT, S. D. NEW YORK.

Form 35 is the account for the assignee to render where no assets have come to his hands; and where assets have come thereto, Forms Nos. 37 and 38 constitute the account, and the register has authority to order the assignee to submit and file the same.

When the application for a discharge is made after sixty days, and within six months after adjudication, it is sufficient for the bankrupt to state in Form 51 that no debts have been proved, or that no assets have come to the assignee, to obtain order to show cause why the discharge should not be granted. Upon the return of such order, the court will grant discharge only on satisfactory evidence of no debts proved, and no assets come to the assignee, which evidence will be the return of the assignee.

Notice was first published on Friday, next time on following Monday, and third time on next succeeding Monday.

• *Held*, insufficient publication. Seven days must elapse between each publication and the proceeding dependent thereon, in order to publish "once a week for three successive weeks."

In uncontested cases the order to show cause may be made by the register if the judge so directs specially or generally.

The order for bankrupt or his wife to attend and be examined — Form No. 45 — is in the nature of a summons, and may be furnished in blank to the registers, signed and sealed by the clerk.

In re JOHN BELLAMY.

BLATCHFORD, J. In this case the register certifies four questions for decision by the court. An assignee was duly elected by the creditors of the bankrupt at the first meeting of creditors, and appeared in person before the register. The bankrupt applied to the register by petition duly verified and drawn strictly in compliance with Form No. 51, for the order to show cause in Form No. 51. The petition sets forth that the bankrupt has no property, real or personal, of any kind, and that none has come to the hands of the assignee, and that more than sixty days have elapsed since the adjudication of bankruptcy. The notice required by the act of the appointment of the assignee, was published on the 16th, 19th, and 26th of August, 1867, but no return has been made by the assignee as prescribed by Form No. 35. On the foregoing facts the four questions are presented.

In re John Bellamy.

1. Can the register (assuming that no assets have come to the hands of the assignee), by a common order, require him to make the return under the oath prescribed in Form No. 35? As to this question, the register says that it would be no violent presumption to suppose the case of an elected assignee who should be unfriendly to the bankrupt, having found no assets and refusing to go before the register and make the oath contemplated in Form No. 35; that in that case the court must be applied to in case the register has no power to compel the assignee by order; that in case there be no opposing party, it would not seem to be necessary to trouble the court by applying to it for such an order, and that in all such cases of obvious duty, the register may be presumed to act by direction of the court as the court.

I am of opinion that the register, under the power given to him by section 4 of the act, and by Rule 5 of the "General Orders in Bankruptcy," to audit and pass the accounts of assignees, has power to make an order requiring the assignee to submit to the court, and file, the account required by section 28 of the act. In a case where no assets have come to the hands of the assignee, Form No. 35 is such account. In a case where assets have come to the hands of * the as- xv
signee, Forms Nos. 37 and 38 constitute such account.

2. Is a return according to Form No. 35 necessary before the granting of the order to show cause, provided for in section 29 of the act, Form No. 51, that is, the order to show cause why a discharge should not be granted to the bankrupt? As to this question, the register says that the Form clearly contemplates the practice of basing the sixty days' discharge upon evidence derived from the assignee, and not from the bankrupt; that such evidence from the assignee would seem to be highest evidence of the fact; and that, indeed, it is a fact of which the bankrupt may, in some cases, be ignorant.

I think that Form No. 51 does not contemplate the practice of basing such order to show cause upon evidence derived from the assignee and not from the bankrupt. The 29th

In re John Bellamy.

section of the act provides that "at any time after the expiration of six months from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts." Form No. 51 embraces the petition of the bankrupt for his discharge, and the order to show cause thereon. The petition is one to be made and signed by the bankrupt, and the form contains at its foot this memorandum: "If this petition is filed within less than six months after the filing of the original petition, it should state that no debts have been proved against the bankrupt, or that no assets have come to the hands of the assignee." It is sufficient, therefore, when the discharge is applied for after the expiration of sixty days from the adjudication of bankruptcy, and before the expiration of six months from such adjudication, for the bankrupt to state in his petition — Form No. 51 — that no debts have been proved against him or that no assets have come to the hands of his assignee. It is not necessary on presenting such petition, to produce the assignee's return, — Form No. 35, — nor any certificate from the assignee that no assets have come to his hands, nor any evidence other than the mere statement in such petition that no debts have been proved against the bankrupt, or that no assets have come to the hands of his assignee. The return — Form No. 35 — is a return to be made under section 28, preparatory to a final dividend and to an application by the assignee for his discharge, and is to be made after the third meeting of creditors. Of course, on the return of the order to show cause, made on the bankrupt's application for his discharge, if such application is made after the expiration of sixty days from the adjudication of bankruptcy, and before the expiration of six months from such adjudication, the court will not grant the discharge without satisfactory evidence that no debts have been proved against the bankrupt or that no assets have come to the hands of the assignee. The highest evidence as to debts is, by section 22 of the act, required to be in the hands of the assignee, and the highest evidence as to the assets must necessarily be in his hands. The evidence must there-

In re John Ballamy.

fore come from the assignee. But a return according to Form No. 35 is not necessary before the granting of the order to show cause provided for in section 29 of the act, Form No. 51, that is, the order to show cause why a discharge should not be granted to the bankrupt.

3. Has the notice of the appointment of the assignee been published in the present case as required by the act, and, if it has not, is such error fatal to the application for the discharge? The notice was published on the 16th, 19th, and • 20th of August, 1867. As to this question, the register says that the 14th section of the act provides that the publication "shall be" once a week for three successive weeks; that the notice in this case was published the first time on Friday of one week, the second time on Monday of the next week, and the third time on Monday of the week after; that this is no doubt one publication in each week of three successive weeks, although a week of seven days did not elapse between the first and second publications; that the letter of the statute does not require that such an interval should elapse, yet it could not be pretended that a publication on a Friday and another on the succeeding Monday was a publication "once a week for two successive weeks;" and the cases of *The People v. Demarest* (10 Abb. Pr. Rep. 468) and *Bunce v. Reed* (16 Barb. S. C. R. 350) seem to settle the question, as only ten days intervened between the first and the last publications in the present case; that he thinks it clear, therefore, that the publication was insufficient; and that, if so, a new order of publication must be made.

The 14th section of the act requires that "the assignee shall immediately give notice of his appointment by publication, at least once a week, for three successive weeks, in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district, or in that portion of the district, in which the bankrupt and his creditors shall reside." Rule 10 of this court provides that "Notice of the appointment of an assignee shall be given by publication once a week for three successive

In re John Bellamy.

weeks, in two of the newspapers named in Rule 21, at least one of which shall be a newspaper published in the city and county of New York, such newspapers to be selected by the register with due regard to the requirements of section 14 of the act." A requirement that a notice shall be published once a week for three successive weeks, is a requirement that it shall be published once in every seven days for the successive periods of seven days each ; that the interval between any two of the publications shall not be less than seven days ; that the interval between the last publication and any proceeding dependent on the publication shall not be less than seven days ; and that the publications shall be three in number, and no more and no less. In the present case, the notice of the appointment of the assignee was not published as required by the act and by Rule 10 of this Court ; and my opinion is that under section 32 of the act, no discharge can be granted in this case until such notice is duly published.

4. Shall the order to show cause — Form No. 51 — there being no opposition, be made by the register? As to this question the register says, that the act provides, section 29, that " the court " shall make the order ; that it seems to be nothing more than an order of course, involving no discretion, nothing but mere obedience ; that section 4 of the act, after prescribing what a register may do in all cases, goes on to prescribe what, in addition to that, he may do in non-contested cases ; that the language is " sit in chambers and dispatch there such part of the administrative business of the court, and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct ; " that all the duties of the register may be regarded as being done while he is sitting in chambers, that the language of the act is not confined to a particular case, but " extends to a particular matter " or subject ; that it would seem, therefore, that it is somewhat in the discretion of the court to do these acts in person or by its registers ; that it is more convenient that this order to show cause be made by the register to whom the case is referred ; and that it is true

In re John Bellamy.

that the word "court" is used in the act, but that if the words "court" and "judge" in all uncontested cases where there is no opposition or adverse appearance, be not construed to mean "register," whenever the court shall, in its discretion, see fit to devolve a duty upon the register, the act will, by construction, become not only a medley of confused and inharmonious provisions, but the court will load itself with ministerial duties which will in the end be found to be both laborious to itself and inconvenient to its suitors.

I do not see that by the act or by the general orders made by the justices of the supreme court, power is specifically given to the register to make this order to show cause. But as the order is one made *ex parte*, and is consequently, so far as the making of it is concerned, uncontested, I think that a register may make it if, under section 4 of the act, he is directed by the district judge to make it. It is very proper and convenient that the register charged with the case should make the order. This decision will, therefore, be regarded as a direction that the register to whom a case is referred shall have power to make the order in Form No. 51, under section 29 of the act.

The register also states that the call for orders to examine bankrupts, their wives, and other witnesses before the registers, is becoming so frequent that it would be exceedingly irksome to fill out each order — Form No. 45 — and dispatch a messenger to the clerk's office to procure the signature of the clerk and the seal of the court, and keep the applicant waiting meanwhile; that he, the register, sent a quantity of blank orders — Form No. 45 — to the clerk's office to procure the signature of the clerk and the seal of the court to them, but the clerk refused to sign or seal the orders in blank unless they were filled up; and that in view of the provisions of Rule 2, of the general orders, he, the register, thinks the clerk is mistaken. The register says that he wishes to submit this question for the decision of the judge.

An order under section 26 of the act, requiring the bankrupt to attend and be examined may properly be regarded

In re William H. Knoepfel.

as a summons, and so may an order, under the same section, requiring the wife of the bankrupt to attend and be examined as a witness; and so may an order, under the same section, requiring the attendance of any other person as a witness. The service upon the * wife or other person of the order is a summoning of him or her under section 26, so that for a failure to attend under such order the party may be arrested. The order No. 45, is a summons when served, quite as much as the summons Form No. 48. Being a summons, it falls within Rule 2 of the "General Orders in Bankruptcy," and therefore, under that rule, blanks of Form No. 45, not filled up, but bearing the signature of the clerk and the seal of the court will, upon application, be furnished by the clerk to the registers.

The clerk will certify this decision to the register, Isaiah T. Williams.

September 9, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

An attorney sought to represent certain creditors upon an appointment by their general attorney, who was himself constituted and approved prior to the passage of the bankrupt act, by a power of attorney authorizing him to sign the firm name to any paper writing, proper or necessary to collect or receive debts due, with power of substitution.

Held, That the authority of the special attorney was sufficient.

Where creditors sought to prove debts for which they held promissory notes of bankrupt, and judgment on one of the notes had been obtained —

Held, That the notes should be produced if required by the register. If debt was proved on the judgment and not on the note, the note need not be produced.

Objection to the proof of a debt, on the ground that it appears on its face that the statute of limitations, if set up, would bar it, is not tenable.

In re WILLIAM H. KNOEPFEL.

BLATCHFORD, J. In this case, at an adjourned meeting of the creditors, held on August 7, 1867, Mr. G. A. Seixas, of counsel for Gourd Freres & Co., creditors, produced a letter of attorney in due form authorizing him to appear at the

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meeting and vote on their behalf in the choice of an assignee. This letter was executed by August Loeffler as attorney in fact for Gourd Freres & Co., under a power of attorney executed by them to Loeffler, dated May 17th, 1864. This power constituted Loeffler attorney "to ask, demand, collect, and receive all debts due our said firm, and any or all such debts; to compromise and settle, release and discharge, and for that purpose to sign our name to any agreement of compromise of settlement, or any other paper writing, proper or necessary for the purpose aforesaid," with full power of substitution. The bankrupt objected on the following grounds to Mr. Seixas' right to appear and vote for Gourd Freres & Co., under such letter of attorney, namely: (1.) Because the power of attorney to Loeffler bore date before the bankruptcy act was passed, and therefore it could not have been intended that Loeffler should represent the firm in matters under the act. (2.) Because the language of the power could not be construed to include such an authority. The bankrupt asked that this question be certified to the judge for his decision.

At the meeting proofs were offered of the claims of two creditors, Gourd Freres & Co., and Spies, Christ & Jay. The proofs showed that promissory notes had been given by the debtor to the creditors for the debts, and that the last named firm had recovered a judgment against the debtor on the note given them. The bankrupt at the meeting, demanded the production of the notes. The creditors refused to produce them, insisting that such production was unnecessary. The register thought otherwise, and the creditors asked that the question be certified to the judge for his decision.

As to the proof of the debt due to Gourd Freres & Co., the bankrupt objected to it, that while no judgment appeared to have been recovered on it, it was, upon its face, barred by the statute of limitations of the State of New York; all the notes embraced in it having been due before October, 1854, and no payments having been made thereon, and the debt

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having been incurred in the State of New York. But the creditors insisted that the statute must be pleaded by the debtor, when the creditor's reply might show that the statute did not operate. The bankrupt insisted that the proof of the claim must anticipate the plea of the statute, and set forth the facts taking the case out of the statute. The register thought otherwise, and the bankrupt asked that the question be certified to the judge.

The register does not state, as prescribed in Rule 19 of this court, his opinion on the question raised as to the power of attorney to Loeffler, nor does it appear whether an assignee was elected at the meeting, and if so, whether Mr. Seixas was permitted to vote on behalf of Gourd Freres & Co., or whether the meeting was adjourned. But still I proceed to decide the question raised. I do not think that the mere fact that the power to Loeffler bears date before the passage of the bankruptcy act is sufficient to show that such power cannot or does not confer authority on Loeffler, to act for the firm, either personally, or by a substituted authority, in proceedings under that act. The question whether the power has that scope depends upon its language. Even though it was given before the act was passed, it may be broad enough in its terms to cover the right of representing the firm as creditors in proceedings under the act.

The power authorizes Loeffler to sign the name of the firm to any paper writing, proper or necessary for the purpose of collecting and receiving any debt due to the firm. The signing the name of the firm to a paper drawn according to Form No. 15, choosing an assignee of the estate of a debtor to the firm, who has gone into bankruptcy, is the signing of a paper writing which is proper for the purpose of collecting the debt due from such debtor to the firm. I am therefore of opinion that the language of the power to Loeffler is sufficient to authorize him, or his duly appointed substitute, to act for the firm in the matter in question.

I am also of the opinion that where a debt sought to be proved is evidenced by a promissory note, the note must be

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produced and exhibited when required by the register, the assignee, or the bankrupt, on proper occasions. Thus, if a proof of debt is handed in to the register at the first meeting of creditors, and it appears that there is a note for the debt, it must be exhibited, if called for. So, also, after the proof of debt is, under section 22, delivered or sent to the assignee, he can require a note which exists for the debt to be produced before paying any dividend on it. Forms Nos. 31 and 33 distinctly show that a bill or note or other security held for a debt is to be exhibited at the time the proof of the debt is handed in, and Forms No. 27 and 31 show that it is to be again exhibited before a dividend is paid on it. In the present case, therefore, the notes held by the creditors, if their claims rest on the notes, ought to have been produced when called for by the bankrupt. If, however, the claim of Spies, Christ & Jay rests on a judgment or a note, and their proof of debt is founded on the judgment and not on the note, then it was not necessary to produce the note. The note was merged in the judgment as a debt of a higher character.

A proof of debt is not open to objection because it appears on its face that the statute of limitations, if set up, would be a good defence to the claim. The proof of claim need not anticipate the defence or give proof of facts to take the case out of the statute. It is a universal rule that a statute of limitations may be waived, and must when relied on as a defence, be set up affirmatively by a debtor. In this case, therefore, the objection to the proof of the debt made by Gourd Freres & Co., is not tenable.

The clerk will certify this decision to the register, Edgar Ketchum, Esq. The certificate of the register, although it is dated August 7th, 1867, did not reach me until September 10th, 1867.

September 13.

In re James M. Loweree.

U. S. DISTRICT COURT, S. D. NEW YORK.

An agent of a creditor filed and proved a claim, but not having a power of attorney to vote for assignee, sought to withdraw the proof of said claim, partly for the reason that he had not stated in his deposition that the creditor held promissory notes not yet due and had agreed to discharge the claim on their payment. Bankrupt objected.

Held, That neither proof of debt nor deposition could be withdrawn, but the creditor ought to be allowed and required to amend his proof.

In re JAMES M. LOWEREE.

BLATCHFORD, J. In this case, at the first meeting of creditors, Nathaniel Niles, as agent for Edward W. Seabury, proved and filed a claim of Seabury against the bankrupt, but he was not authorized by any letter of attorney from Seabury, to vote on behalf of Seabury in the choice of an assignee. Niles then asked leave to withdraw from file, the proof of Seabury's claim. To this the bankrupt objected.

It was stated that Seabury had accepted notes of the bankrupt for \$5,000, and agreed to give him a full discharge when they were paid; that the notes were not yet due; and that these facts had, through an error on the part of Niles, been omitted from his deposition in proof of Seabury's claim. On this ground, in part, Niles asks leave to withdraw the deposition. The bankrupt objected to this.

The register thought that Niles ought to be allowed to amend the proof of Seabury's claim, but that he could not, under the circumstances, withdraw from the files the proof already put in. Niles insisted upon his right to withdraw the deposition from the files, and asked that the question should be certified to the judge for his decision.

The register is correct in his view. Neither the proof of debt nor the deposition can be withdrawn, but the party ought to be allowed and required to amend his proof.

The clerk will certify this decision to the register, Edgar Ketchum, Esq.

In re Abraham E. Hasbrouck.

* U. S. DISTRICT COURT, S. D. NEW YORK. xvii

A register is authorized and required, upon the request of a voluntary bankrupt, to receive a surrender of his property and safely keep it until turned over to an assignee.

General Order 13 applies only to involuntary cases.

*In re ABRAHAM E. HASBROUCK.*¹

BLATCHFORD, J. In this case, on the appearance of the bankrupt before the register to whom the case was referred, he requested the register to take possession of his property, consisting of a store of goods at Lloyd, in Ulster County, set forth in the bankrupt's schedules as of the value of \$3,336.08. The register declined to comply with the request of the bankrupt until he should be advised by the court of his duty to do so. The register states that the bankrupt's request was based upon the following words contained in Section 4 of the act, "to receive the surrender of any bankrupt;" that there is nothing else in the act of that tenor, nor are there in it any provisions for the execution of such a trust by the register; that, by Rule 13 of the "General Orders in Bankruptcy," the marshal is authorized to take possession of property, but the register thinks that provision applies only to cases of involuntary bankruptcy; and that, as the property is or ought to be in the custody of the court from and after the adjudication of bankruptcy, it is important to know who is to be responsible for it.

In a case of voluntary bankruptcy, the debtor is required by section 11 of the act to state in his petition "his willingness to surrender all his estate and effects for the benefit of his creditors." By section 4 of the act, the register has the power, and it is made his duty, to "receive the surrender" of the bankrupt, and "to grant protection."

These are all the provisions there are in the act in regard to surrender or protection. Form No. 1 contains an averment that the debtor "is willing to surrender all his estate and effects for the benefit of his creditors."

¹ Cited in the case of *Henry Bogart & Robert D. Evans*, 2 N. B. R. 178, *quarta*.

In re Abraham E. Hasbrouck.

Rule 5 of the "General Orders in Bankruptcy" provides that a register may conduct proceedings in relation to the following matters, among others, when uncontested, namely, "receiving the surrender of a bankrupt," and "granting protection thereon." In the present case the bankrupt's petition was referred to the register by Form No. 4. The register does not state whether he has made an adjudication of bankruptcy, according to Form No. 5, and issued a warrant according to Form No. 6, but I assume that he has done so. There is nothing in such warrant authorizing the marshal to take possession of the property of the bankrupt, nor is there any provision in the act authorizing or requiring the marshal to take possession of the property of a voluntary bankrupt after the warrant — Form No. 6 — is issued. Notices of a meeting of creditors are to be given, which meeting may, under section 11 of the act, be held at as late a period as ninety days after the adjudication of bankruptcy and the issuing of the warrant. At such meeting an assignee is to be elected or appointed. The assignee has five days in which to accept the trust, and as soon as he is appointed and qualified, an assignment of the bankrupt's estate is to be made to him by the judge or the register; and section 14 provides that such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee. It results from these provisions that during the interval between the adjudication of bankruptcy in the case of a voluntary bankrupt, and the delivery of the assignment to the assignee, which interval may be as much as ninety-five days or even more, the property of the bankrupt cannot, under the act, be put into the possession or custody of the court, or of any officer acting under the bankruptcy act, but must remain in the possession and control of the bankrupt, unless it can, during that interval, be kept in the temporary custody of the register, to be handed over by him to the assignee when elected or appointed. And there seems to be no scope for the operation of the provision in regard to the surrender of

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a bankrupt, unless it is construed to mean that a voluntary bankrupt may place his estate in the possession of the register as soon as he is adjudicated a bankrupt.

In the case of an involuntary bankrupt, section 42 of the act requires that the warrant to be issued to the marshal as soon as the debtor is adjudged a bankrupt, shall direct the marshal to take possession of the estate of the debtor; and Form No. 59 contains such a direction. The provision of Rule 13 of the "General Orders in Bankruptcy," which says that "it shall be the duty of the marshal as messenger, to take possession of the property of the bankrupt, and to prepare within three days from the time of taking such possession, a complete inventory of all the property, and to return it as soon as completed," applies only to a case where a warrant is issued to the marshal to seize the property, and therefore not to a case of voluntary bankruptcy. In analogy to this taking possession by the court of the estate of a bankrupt in a case of involuntary bankruptcy as soon as an adjudication of bankruptcy is made, the act contemplates that a voluntary bankrupt who states in his petition his willingness to surrender all his estate and effects for the benefit of his creditors may, as soon as he is adjudged a bankrupt, surrender his property into the hands of the court, by surrendering it to the register who has made the adjudication of bankruptcy.

I am therefore of the opinion that if the debtor in this case has been adjudged a bankrupt and requests the register to receive a surrender of his property, the register is authorized and required to receive such surrender, and to keep the property safely until it can be turned over to the assignee. It is true that the act contains no special provisions for the execution of the trust, but the court extends, by section 1 of the act, "to all acts, matters, and things to be done under and in virtue of the bankruptcy," and the register exercises the power of the court in regard to the property.

The clerk will certify this decision to the register, Theodore B. Gates, Esq.

September 14, 1867.

In re Augustus A. Bliss.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where it appears that an assignee has been chosen by the influence of the bankrupt, the court will feel bound to withhold its approval; and whenever a register is satisfied that reasons exist why an assignee chosen or appointed should not be approved by the judge, it is his duty to state such reasons fully in submitting the question of such approval to the judge.

In re AUGUSTUS A. BLISS.

BLATCHFORD, J. In this case the register certifies that in the course of the proceedings in said cause before him, the following questions arose pertinent to the said proceedings. That is to say:

At the first creditors' meeting the solicitor for the bankrupt appeared before him, and after waiting a while for the creditors to come in, applied to the register to adjourn the meeting, alleging that one or two creditors had promised to come in and prove their debts, and choose an assignee, and that they had probably forgotten it; but that in case an adjournment was had, he would on the adjourned day have them or one of them present to choose an assignee. He urged that the petitioner had an interest in having a good assignee and that he might properly procure one to be elected, rather than permit him to be appointed by the register. The register entertained no doubt that the granting of an adjournment was a matter resting in the sound discretion of the register, with which this court will not interfere unless it be abusively exercised, nor had he any doubt that the bankrupt had no *locus standi* from which he could make such a motion, as he is not interested for the creditors and cannot assume or be allowed to act for them without authority. The motion to adjourn was therefore denied. Soon after the bankrupt came in, and with him the two creditors who were expected, and they proceeded to prove their claim and elect an assignee.

In this case it is clear that it was, in effect, the bankrupt who elected the assignee. It is certainly against the policy

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of the act that a bankrupt should select his assignee, as by electing a fraudulent person or a person disposed to favor him, the rights of the creditors might suffer. It is true that if the creditors do not care sufficiently for the matter to attend to the meeting, they ought not to complain. But still the law is no less brought into contempt. A fraudulent discharge of a debtor, or the discharge of a debtor who does not surrender all his assets, is precisely what those charged with the execution of the law are bound to guard against.

If the court could be advised that in any particular case the bankrupt had brought in one or more of his friends, although *bonâ fide* creditors, and had by them chosen an assignee, who was also his friend and in his interest, it is clear that the court would withhold its approval.

The question upon which the register asks instruction is this: When the register is satisfied that this is the case, shall he certify such his opinion and the grounds of it to the court; and that unless there be a standing rule, requiring him to do so, he would probably feel that his certificate might be deemed supererogative if not impertinent.

* When the register is satisfied that any reasons xviii exist why an assignee elected or appointed should not be approved by the judge, it is his duty to state such reasons fully in submitting to the judge the questions of approval, and this decision will be regarded as a standing rule to that effect.

The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

September 19, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

In the course of proceedings in the case of a voluntary bankrupt, it was discovered that his schedules were incorrect and deficient, and the register, on his own motion, ordered the same to be corrected and amended, to which the bankrupt objected.

Held, That such order may be so made by the register at any stage of the proceedings.

In re Freeman Orne.

He must specify in what particulars they are incorrect or deficient in his judgment.

In Schedule A, No. 3, in respect to debts stated, the non-existence, or existence of a promissory note or a judgment, and sole or joint liability of bankrupt, must be also stated in sufficient form.

The sign "do.," dots, or inverted commas cannot be used in the schedules by way of reference to indicate anything necessary to be stated.

A register is charged with the general supervision and care of a case, irrespective of motions for amendment, or any other action on the part of creditors, assignees, or bankrupts.

In re FREEMAN ORNE.

BLATCHFORD, J. In this case the petition of the debtor, with schedule attached, was filed on the 27th of June. On the 29th of June the register certified the papers to be correct, and adjudged the petitioner a bankrupt, and a warrant was issued to the marshal, returnable August 7. On that day a meeting of creditors was held, which was adjourned from time to time until the 4th of September, when an assignee was appointed. In Schedule A annexed to the petition there was no averment whether the bankrupt contracted the debts set forth individually or as a copartner. In many cases it was stated in such schedule that judgment had been obtained by merely inserting the word "judgment" in the last column of Schedule A, No. 3; and in many cases in that form there was no statement, affirmatively or negatively, as to judgments or notes. In the same form there was used in many cases the contraction "do. do.," in the reference " , , , , " as applied to language and words used before and above such marks.

When the proofs of debt came to be made and met, it was found that, in two cases (both on the debtor's Schedule A), the proof was against the bankrupt jointly with other persons, his partners. This was the first knowledge the register had of any partnership of the bankrupt.

In view of this fact of partnership, and the contractions and references referred to above, the register made an order on the 17th day of September, as follows: "It appearing in the course of the proceedings in this entitled matter that the

In re Freeman Orne.

schedules heretofore filed by the petitioner, and upon which an adjudication of bankruptcy was made, are incorrect and deficient, and do not meet the requirements of the law ; it is ordered that the said Freeman Orne make and file a properly verified statement of his unsecured debts, which shall be as an amendment to Schedule A, No. 3, heretofore filed, which amendment to said schedule shall set forth fully the various facts rendered necessary by the requirements of the law, as shown in the notes of instructions and headings ordered for use in said Schedule A, No. 3, by the rules of the supreme court, and that such amendments shall be made and filed by the 14th day of September, A. D. 1867."

On the 14th of September the bankrupt appeared, and objected to the order as one which the register had no power to make, and prayed that five several points, as an appeal from the action of the register, might be certified to the judge for his decision.

1. Whether the register, after an adjudication of bankruptcy, and accepting the surrender of the bankrupt and issuing a warrant, and the holding of the first meeting of creditors, and the choice or appointment of an assignee, can, of his own motion, and not upon the motion of the assignee, or of some creditor who has proved his claim, order an amendment of the bankrupt's schedule of creditors, theretofore filed by him, to be made by the bankrupt.

In regard to this question the register states that he is clearly of the opinion that the register can, of his own motion, order such amendments ; that Rule 5 of the supreme court specifies "ordering amendments" as one of the acts the registers may perform under the orders of court referring cases to them, and that he ought to do so from the fact that otherwise (the certificate of correctness by the register being considered conclusive) oversights could not be corrected nor could a condition of facts arising in the course of proceedings be taken notice of as in this case.

The register is correct in this view. By section 32 of the act, the court is forbidden to grant a discharge to the bank-

In re Freeman Orne.

rupt unless it appears to the court that he has in all things conformed to his duty under the act, and the form of discharge prescribed by that section contains a recital that the bankrupt appears to have conformed to all the requirements of law in that behalf. Where a case has been conducted before a register, as all cases are required to be by the act, it is impossible for the court to determine whether the bankrupt has conformed to all the requirements of the act, unless the register first makes an examination as to that question, and certifies the result to the court. It is a necessary incident of the provision of the act that the bankrupt must conform to all the requirements before he can have a discharge; that the court, and the register acting as the court when a case is referred to him, should have the power at all times to require the bankrupt to conform to all the requirements of the act. An error whenever discovered must be corrected, no matter what proceedings have theretofore taken place. The 33d Rule of the "General Orders in Bankruptcy," shows that when a debtor omits to state in the schedules annexed to his petition any of the facts required to be stated concerning his debts or his property, the court, or the register acting as the court, is to determine whether to admit the schedules as sufficient or to require the debtor to make further efforts to complete the same according to the requirements of the law. This determination may be made by the register of his own motion, and at any stage of the proceedings, and if he determines that the schedules are insufficient, he may order them to be amended.

2. Whether it is necessary and requisite to a compliance with the requirements of the law, as shown in the notes of instruction and headings to Schedule A, No. 3, when no note has been given by the bankrupt, or no judgment has been obtained against him for or on account of the debt stated, in addition to stating what is the consideration of the debt, to state that no note has been given, or no judgment has been rendered by or against the bankrupt; and also in case the bankrupt be solely liable for the debt, whether it is

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necessary to state that no person is liable with him, as co-partner or joint contractor.

In regard to this question, the register states that he thinks the supreme court intended, by the headings and notes of instruction referred to, that the fact of the existence of a judgment, or a note, &c., should be affirmed or negatived, and not be left to implication or suggestion.

I think that it is necessary to state in the schedules whether or not any note has been given or any judgment has been rendered, and also whether or not any person is liable with the debtor as copartner or joint contractor. What shall be considered a sufficient form of statement in those respects is necessarily a matter allowing of some latitude of discretion on the part of the register.

3. Whether the said order (if the register under the circumstances has power to make it), should not specify particularly the respects in which the schedules are, in the opinion of the register, defective ; and in which the schedules should, in the judgment of the register, be amended.

In regard to this question the register says that he considers an order that the schedule conform to the notes of instruction and headings of the blanks and forms, sufficiently specific to guide the attorney or bankrupt in making amendments, assuming ordinary care and intelligence on the part of practitioners.

I think that the order ought to specify particularly the respects in which the schedules are, in the opinion of the register, defective, and in which they should, in his judgment, be amended.

4. Whether under Rule 14 of the supreme court, which requires that all petitions and the schedule filed therewith shall be printed or written out plainly and without abbreviation or interlineation, except where such abbreviation or interlineation may be for the purpose of reference, it is permissible to refer to an above written word or statement as follows :

In re Freeman Orne.

Name.	Residence.
A. B.	New York City.
C. D.	“ “ “

using the customary marks “ “ to refer to the above written words.

In regard to this question the register states that he
xix thinks the rule precludes the use of dots * to indicate
anything necessary to be stated. I concur with the
register.

5. It is supposed that one of the defects and errors in the schedule referred to in the order, as appearing in the course of proceedings in the matter of Orne, is the omission in stating the debt scheduled as William H. Earle's, to state that the bankrupt was jointly liable with any other person. It appeared by the proof of debt offered by the said creditor, that the debt exists as a judgment against two other persons jointly with the bankrupt, and that another defect or omission appeared by the fact that at the first meeting, a creditor whose name was not on the schedule filed by the bankrupt, appeared and made proof of a claim against the estate of the bankrupt; and the question is submitted whether, upon the facts, the bankrupt can be ordered, upon the motion of the register, after the adjournment of the first meeting of creditors, to amend the schedules annexed to his petition, to conform to the facts.

In regard to this question, the register says that the facts are not fully stated, that the proof of debt in the case of Earle averred that the persons against whom, jointly with the bankrupt, the judgment was obtained, were copartners with the bankrupt, and that, in the opinion of the register, he should have full power to order, on his own motion, necessary amendments to make the schedules show all facts connected with debts, or else he should have no power so to do.

I am of the opinion that the bankrupt can be ordered, on the motion of the register, after the adjournment of the first meeting of creditors, to amend the schedules annexed to his petition, to conform to the facts.

In re Eliza Altenhain.

The register states in his certificate that he is of the opinion that the registers are charged with the general supervision and care of cases referred to them without regard to the fact whether creditors, or assignees, or bankrupts move for amendments or any other action. I concur with the register in this view.

The clerk will certify this decision to the register, James F. Dwight, Esq.

September 23, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

A holder of a mortgage on real estate of the bankrupt, being named as a creditor in bankrupt's schedules, sought through his lawyer to file a protest against being so named at the first meeting of creditors. Bankrupt objected because the paper was not signed.

Held, That inasmuch as the creditor did not appear in person or by duly constituted attorney, and had proved no debt, the protest could not be placed on file.

In re ELIZA ALTENHAIN.

IN this case the register certifies that in the course of the proceedings in said cause before him, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Mr. Edwin James, who appeared for the bankrupt, and Mr. Samuel B. Higgenbotam, who appeared for William B. Astor, alleged by the petitioner in her schedules to be one of the creditors of the said bankrupt; and that the same arose in the following manner: On the 18th day of September, 1867, at 12 M., the first meeting of creditors was held pursuant to notice published and served by the messenger. These creditors appeared and proved and filed proof of their claims. Mr. Higgenbotam appeared as the attorney and counsel of William B. Astor, named in Schedule A as a creditor by virtue of a mortgage on certain real estate of the bankrupt, executed by a former owner thereof, and he asked leave to put on file a protest on the part of Mr. Astor against being named as

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a creditor. Mr. James objects thereto on behalf of the bankrupt because the paper is not sworn to. The register considers that as Mr. Astor does not appear in person or by attorney duly constituted, and has not proved any debt, the paper cannot be placed on file. Mr. Higenbotam insists upon his claim, and demands that the question be certified to the judge. The following is the paper offered by Mr. Higenbotam :

" IN BANKRUPTCY. }
In re Eliza Allenhain. }

" William B. Astor appears before Edgar Ketchum, Esq., register, &c., by S. B. Higenbotam, his attorney, and protests against being named as a creditor in these proceedings or party hereto, upon the ground that he has no information of any obligation of the petitioner to him.

" And he further states that he does not hold any bond of the petitioner, and objects that the grounds of said alleged indebtedness are not set forth in the petition.

" SAM. B. HIGENBOTAM,
 " *Att'y for W. B. Astor.*

" *September 18, 1867.*"

BLATCHFORD, J. The register was correct in his conclusion, and in the grounds on which he placed it. The clerk will certify this decision to the register, Edgar Ketchum, Esq.

September 25, 1867.

DISTRICT COURT OF ALLEGHENY COUNTY, PENN.

The U. S. bankrupt act of 2d March, 1867, as soon as it went into operation, *ipso facto* suspended all action upon future cases arising under the insolvent laws of this state, where the insolvent laws act upon the same subject matter, and upon the same persons, as the bankrupt act.

The bankrupt act suspends all proceedings under the act of assembly of July 12, 1842, where the latter act operates on the same subject matter, and upon the same persons, as the former.

Aside from the provisions of the bankrupt act, a warrant of arrest under the act of 1842 is irregular and cannot be enforced where there is a pending levy on defendant's personal property by virtue of a *f. fa.* in the sheriff's hands.

Commonwealth v. Michael O'Hara.

THE COMMONWEALTH, *at the instance of* JAMES MILLINGAR, *v.* MICHAEL O'HARA.¹

WILLIAMS, A. J. This is a proceeding by bench warrant under the act of July 12th, 1842, at the instance of James Millingar, a judgment creditor of O'Hara & Robinson, against Michael O'Hara, a member of the said firm. The affidavit of complainant, upon which the warrant of arrest in this case was issued, sets forth the recovery of a judgment, in this court, by the affiant, against the firm of O'Hara & Robinson, upon a bond in the penal sum of \$50,000, conditioned to indemnify him from his liability as indorser of certain promissory notes drawn by the said firm to the amount of \$25,000, \$8,500 of which notes, it is averred, had become due and had been protested for nonpayment, and which he had become liable to pay, and one of which, amounting to \$2,500, he had actually paid.

The affidavit charges that the defendant, bargained and sold a large quantity of tools and other property of the firm, of the value of \$1,500, for four hundred dollars, and that he so disposed of the said property with intent to defraud his creditors.

That he gave to his wife, or some person in trust for her, about \$7,000 of the moneys of the firm, with intent to defraud his creditors.

That he removed out of the country certain property, to wit: bank notes, United States treasury notes, drafts, and bills of exchange, amounting in the whole to about \$20,000, with intent to defraud his creditors.

That he has property and money which he fraudulently conceals, and unjustly refuses to apply to the payment of affiant's judgment.

That he has disposed of a portion of his property, and is about to dispose of other portions of his property, with intent to defraud his creditors.

¹ Cited in *Langley's case*, 1 N. B. R. 157, *quarto*; *Waite & Crocker's case*, 2 N. B. R. 146, *quarto*; and in case of *Van Nostrand v. Barr*, 2 N. B. R. 154, *quarto*.

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Upon the presentation of the affidavit a warrant for the arrest of the defendant was issued, in accordance with the requirements of the act, and he was thereupon arrested and brought before me for hearing; but, at his instance, the hearing of the case was adjourned to a subsequent day, upon his giving bond, with surety, for his appearance at that time. At the adjourned hearing his counsel moved to quash the warrant on two grounds:

First. Because the bankrupt act of the 2d of March, 1867, supersedes all proceedings under the act of 12th July, 1842, where, as in this case, the complainant's debt is provable under the bankrupt act, and the defendant is amenable to its provisions.

Second. The warrant was irregularly issued, and cannot be enforced under the provisions of the act of 12th July, 1842, because, at the time the said warrant was issued there was a pending levy on the personal property of the partnership, consisting of the materials, stock, manufactured ware and merchandise of the said firm, and upon the individual property of the defendant, embracing his stock in the Pittsburgh and Connellsville Railroad Company, and in the Allegheny Valley Railroad Company, by virtue of a *fi. fa.* issued on complainant's judgment; and because all the moneys and effects of the defendant in the possession of the Exchange National Bank have been attached, by virtue of an attachment in execution issued on said judgment and served upon the garnishee, as appears by the said writs, and the indorsement of the sheriff thereon.

The motion was thereupon argued by the counsel on both sides, and held under advisement, and the further hearing of the case adjourned until the present time, upon the defendant's entering into a new bond, with surety, for his appearance.

In considering and determining the questions raised by the defendant's motion, I have availed myself of the learning and judgment of my *brethren, the president
xx judge of this court, and the president and associate

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judges of the court of common pleas. At my request and with the view of securing uniformity of decision and practice under the act authorizing this proceeding, they have investigated and considered the questions with me, and the result is that we have unanimously come to the following conclusion :

First. That the bankrupt act, as soon as it went into operation, *ipso facto* suspended all action upon future cases arising under the insolvent laws of this state, where the insolvent laws act upon the same subject matter and the same persons as the bankrupt act.

Second. That the bankrupt act suspends all proceedings under the act of 12th of July, 1842, where the latter act operates on the same subject matter and upon the same persons as the former.

Third. That the bankrupt act operates upon the subject matter of the complainant in this case and upon the persons affected thereby, and therefore it suspends the operation of the act of July 12th, 1842, under which the warrant for the defendant's arrest was issued.

Fourth. That even if this were not so, the warrant in this case was not regularly issued, and cannot be enforced under the provisions of the act of July 12th, 1842, pending a levy on the personal property of the partnership and the individual property of the defendant, by virtue of the *fi. fa.* in the sheriff's hands, issued on complainant's judgment; and pending the attachment of defendant's effects, in the possession of the garnishee, by virtue of the execution attachment issued on said judgment.

Fifth. That the warrant issued in this case must therefore be quashed.

But before proceeding to make the order it may be proper to give briefly the reasons in support of the conclusions to which we have come.

First. The Constitution of the United States gives to congress the power to establish uniform laws on the subject of bankruptcies throughout the United States. How far

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this power supersedes state legislation was at one time a matter of much discussion, upon which judges differed in opinion. Some held that the power in congress is exclusive of that of the states; and whether exerted or not, it supersedes state legislation. *Golden v. Prince*, 3 Wash. C. C. 313. Others maintained that the power in congress is not exclusive, and that, when unexerted, the states are at liberty to exercise it; and this opinion is now firmly established by judicial decisions. *Sturges v. Crowninshield*, 4 Wheat. 193; *Ogden v. Saunders*, 12 Ib. 213. The well settled doctrine on the subject is that the powers granted to congress are not exclusive of similar powers existing in the states, unless where the Constitution has expressly, in terms, given an exclusive power to congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states. In all other cases the states retain concurrent authority with congress, except when the laws of the states and of the Union are in direct and manifest collision on the same subject, and then those of the Union, being the supreme law of the land, are of paramount authority, and the state laws so far, and so far only as such incompatibility exists, must necessarily yield.

But in the case of concurrent powers, when once the legislature of the Union has exercised its powers on a given subject, the state power over that same subject which was before concurrent, is by that exercise prohibited. 1 Kent Com. 300, 301. This doctrine has been applied by the courts to the power of congress on the subject of bankruptcies; and it has been held that though the power in congress is not exclusive of the states, and when unexerted the states are at liberty to exercise the power in its full extent, unless so far as they are controlled by other constitutional provisions; yet when congress has acted upon the subject to the extent of the national legislation, the power of the states is limited and controlled. 4 Wheat. 193; 12 Ib. 213.

Let us then apply these principles to the question before us. If the bankrupt act conflicts with the insolvent laws of

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this state, the operation of the latter is suspended so long as the bankrupt law continues in force. It is true that there is a wide difference between the bankrupt act and our insolvent laws as it respects the relief afforded to the debtor; for while the bankrupt may be discharged from his debts, the insolvent debtor is only discharged from imprisonment. And there are marked differences in other respects. But these differences in the scope and purposes of the acts, and as it respects the regulations contained therein, do not necessarily prevent the acts from conflicting with each other. On the contrary, they may occasion the conflict. The line of partition between bankrupt and insolvent laws is not so distinctly marked as to enable any person to say with positive precision what belongs exclusively to the one, and not to the other class of laws. It is difficult to discriminate with accuracy between bankrupt and insolvent laws; and therefore a bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law. 2 Kent Com. 390. As it respects the laws in question, they both operate upon the same subject matter, and upon the same persons, and they provide in some respects a different rule for the distribution of a debtor's effects among his creditors. They are therefore in direct and manifest collision with each other, and the laws of the state must yield to the paramount authority of the national legislature. And so the question was decided in *Ex parte Lucius Eames*, 2 Story Rep. 822, cited by defendant's counsel. It was there held that the bankrupt law of 1841, upon going into operation in February, 1842, *ipso facto* suspended all action upon future cases arising under the state insolvent laws, where the insolvent persons were within the purview of the bankrupt law. In delivering the opinion, Judge Story said: "It appears to me that both systems cannot be in operation or apply at the same time to the same persons; and where the state and national legislation on the same subject, and the same persons, come in conflict, the national laws must prevail, and suspend the operation of

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the state laws. This, as far as I know, has been the uniform doctrine maintained in all the courts of the United States." And, after referring to the different opinions expressed by the judges in the case of *Sturges v. Crowninshield*, 4 Wheat. 193, as to the question of the exclusive power vested in congress by the Constitution of the United States to pass a bankrupt law, he says: "But all the court were agreed that when congress did pass a bankrupt act, it was supreme, and that the state laws must yield to it, and could no longer operate upon persons or cases within the purview of such act."

"It seems to me, therefore," he adds, "that nothing remains upon which an argument can be founded, that the insolvent laws of Massachusetts are not, as to persons and cases within the purview of the bankrupt act, completely suspended. Each system is to act upon the same subject matter, upon the same property, upon the same rights, and upon the same persons — creditors as well as debtors. Both cannot go on together without direct and positive collision; and the moment that the bankrupt act does or may operate upon the person or the case, that moment it virtually supersedes all state legislation.

And in the case of *Griswold v. Pratt*, 9 Met. 16, it was subsequently held by the supreme court of Massachusetts, that while the United States bankrupt act of 1841 was in force, proceedings against a debtor, under the insolvent laws of the state, were unauthorized and void, if the debtor and his property were subject to the operation of the bankrupt act, although no proceedings under it were had against him. It was conceded in that case, as it has been by the complainant's counsel in this, that the effect of the bankrupt law was necessarily to suspend all state laws with which it came in conflict; but it was contended there, as it has been in this case, and as was ruled in *Zeigenfuss' case*, 2 Iredell, 463, that a state insolvent law may exist and operate with full vigor, until the bankrupt law attaches upon the person and property of the debtor, by proceedings instituted in bankruptcy; and that no case of conflict can arise until after the

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proceedings in bankruptcy have reached that state in which the debtor has been judicially declared a bankrupt. But this position, however plausible it may appear at first view, cannot, as the court say, be sustained. The right to proceed, under the insolvent law of the state, the bankrupt law being in full force, must be placed on a firmer basis than that of the failure of the insolvent to apply to the district court of the United States for the institution of proceedings in bankruptcy. If the proceedings under the insolvent law are valid at all, they must be valid to the extent of carrying out and perfecting such proceedings after they have once been instituted. Such effect has always been admitted to attach to proceedings legally commenced before the bankrupt law went into operation, but then pending. Sound principle would require that, in all cases where proceedings could be legally instituted, they should have the legal capability of being perfected and closed under the state law. But under the view taken of this question on all sides, and as conceded on the part of the plaintiff, the proceedings under the state insolvent law, by virtue of which he claims the property in controversy, might be wholly superseded and rendered void, at the will of the insolvent debtor, by filing * his xxi petition in bankruptcy, during any stage of the proceedings under the insolvent law, before his assets should be divided among his creditors.

There can be no doubt, as it seems to me, both upon reason and authority, that the present bankrupt act supersedes all local laws acting upon the same rights and affecting the same persons and the same property.

Second. And for the like reasons the bankrupt act suspends all proceedings under the act of 1842, by virtue of which the warrant in this case was issued. The very matters charged in the affidavit of complaint as a ground or cause for the arrest of the defendant, constitute and are declared to be acts of bankruptcy under the provisions of the 39th section of the act, and for which an ample remedy is provided by the 40th section. By virtue of the provisions of this

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latter section, the creditor, upon filing his petition, may obtain an order on the debtor to appear in five days from the service thereof and show cause why he should not be adjudged a bankrupt; and the court may also, by its injunction, restrain the debtor and any person, in the mean time, from making any transfer or disposition of the debtor's property, and from any interference therewith; and if there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels, or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest the alleged bankrupt, and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance, from time to time, until the decision of the court upon the petition, or the further order of the court; and forthwith to take possession provisionally of all property and effects of the debtor, and safely keep the same until the further order of the court. The act, it will be seen, provides an ample and effectual remedy for all the matters complained of and charged against the defendant in this case. But the provisions of the act of 1842 are in direct conflict with the provisions of the bankrupt act. The act of 1842 provides for the discharge of the defendant upon his paying the debt or demand, with costs of suit; or upon his giving security to pay the same with interest within the time specified in the act; or upon his giving bond, with sureties, that he will not remove or assign his property with intent to defraud his creditors, or with a view to give a preference to a creditor for an antecedent debt *until* the demand of the complainant, with costs, shall be satisfied, or upon giving bond, with sureties, to take the benefit of the insolvent laws. The bankrupt act forbids all preferences, and sets them aside where they are made for the purpose of giving one creditor an advantage over another; and, as we have seen, it suspends the operation of the insolvent laws. It is therefore clearly in conflict with the act of 1842, which recognizes and makes provision for

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such preferences, and is in some respects a supplement to the insolvent law of the state.

Third. But aside from the provisions of the bankrupt act, the warrant is irregular, and cannot be legally enforced. It was not the intention of the legislature, in adopting the act of 1842, to authorize the arrest and imprisonment of a debtor as a civil remedy in any case in which he could not be arrested and imprisoned before the passage of the act. But pending a levy on personal property by virtue of a *fi. fa.* the creditor, before the passage of the act, could not subject his debtor to imprisonment on a *ca. sa.* And if he could not, how can it be said that, by the provisions of the act of 1842, the defendant in this case cannot be arrested? If the act of 1842 has not been passed he could not be arrested pending the levy on the *fi. fa.*; and it is only in a case where, by the provision of the act, he cannot be arrested, that a warrant can issue. But it is unnecessary to spend time in the further discussion of the subject.

The question was decided by the district court of Philadelphia, in the case of *Neal v. Perry*, 4 Penn. L. J. 410. It was there held, in an able opinion delivered by Judge Sharswood, that, pending a levy on real estate by virtue of a *fi. fa.*, a warrant of arrest under the act of 12th July, 1842, cannot issue against the defendant. If this be so, there is greater reason for holding that such a warrant cannot issue pending a levy on personal property, by virtue of a *fi. fa.* in the hands of the sheriff, which is regarded as satisfaction, by the law, for some purposes, as long as it subsists.

The motion of defendant's counsel is therefore sustained on both grounds; and it is accordingly ordered that the warrant issued in his case be, and the same is hereby quashed.

Acheson, Brown & M'Connell for the Commonwealth.

Fetterman, Swartzwelder & Ammon, for the defendant.

In re John Bellamy.

U. S. DISTRICT COURT, S. D. NEW YORK.

In an uncontested case, the proper register, by special order of the court, may direct the making of the order to show cause in Form 51, and make it returnable before the court at such register's office.

The notices to creditors, — Form 52, — if sent by mail, must be mailed by the clerk, for which he has his fee by General Order 30.

Where no debts have been proved against bankrupt, or no assets have come to the assignee's hands the order — Form 51 — should contain directions under General Order 25, respecting the second and third meetings of creditors, if the same shall not have been held.

If no creditor appears in opposition to the discharge by the return day of said order, the register may administer to the bankrupt the oath provided by section 29.

Under section 32, all the requirements of the act, from the commencement of the proceedings to the end, must be conformed to as prerequisites to the granting of a discharge, and the bankrupt is bound to see to the regularity of such proceedings.

Before a discharge can be granted the register must, after a careful examination, certify that the bankrupt has conformed to all the requirements of the act; and no discharge will be granted until all the papers are filed with the clerk, as required by General Order 7.

In every case of a petition for a discharge, the clerk will enter a special order referring it to the proper register for proper proceedings to be had, and the register, in acting under such special order, will have a fee of \$5 for each day's service, under section 47.

In re JOHN BELLAMY.

BLATCHFORD, J. In this case application was made to the register upon a petition in due form, for an order to show cause why the bankrupt should not be discharged from his debts.

The register states that he is in doubt as to the form of the order, that is, as to whether it should be made returnable before the register, and if not, on what day and hour it should be made returnable before the court; that there is no prospect of any opposition to the discharge, and that the bankrupt insists that the order should be made returnable before the register; that it should give notice of the second and third meetings of the creditors pursuant to Rule 25 of the "General Orders in Bankruptcy;" that in case no one

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appears to oppose on the return day, or before, the bankrupt may on that day make and subscribe before the register to the oath required by the 29th section of the act; that thereupon it would be the duty of the register, pursuant to the provisions of Rule 7 of the "General Orders in Bankruptcy," to file all papers in the case with the clerk, and certify by the usual daily certificate the proceedings of such last day before him, and that the court will thereupon, nothing appearing in the record to the contrary, sign the bankrupt's final discharge.

The register also states that it would seem scarcely worth while, when a case really goes, as it were, by default, when the discharge must inevitably follow upon the proceedings theretofore had, that the court should be troubled to fix a day to do nothing; that in case there is opposition, and the creditor opposing files the specifications provided for by section 31 of the act, the register would then—if there were no assets—in like manner return all the papers into court, as directed by said Rule 7, with the usual certificate, from which certificate and papers, composing the record, the court would order a trial, as it might see fit, pursuant to section 31; that the case would then seem to be closed before the register, unless sent back for some purpose; that certainly, there being no assets, there would be nothing more a register could do; and that if a trial were ordered by the court and the bankrupt were to be successful, the court would sign his discharge, and if unsuccessful the discharge would be denied.

I have heretofore held that upon a petition according to Form No. 51, by a bankrupt for his discharge, the register to whom the case is referred may direct the making of the order to show cause contained in Form No. 51. This order may be made returnable before the court at the office of the register, to be sufficiently designated, on such day and hour as the register appoints, allowing time for the proper publication of notice. The order must name the newspaper in which the notice is to be published. The selection of the newspapers is to be made by the register, with due regard to the requirements of section 29 in reference to such selection,

In re John Bellamy.

and is to be made from among the newspapers named in Rule 21 of the rules of this court in bankruptcy. The publication will be made for three times once a week, in two newspapers, with an interval of seven days between the last of the three publications and the return day of the order. The notice, — Form No. 52, — both as published and as served, must specify as the place of hearing the office of the register, to be sufficiently designated. If the notices to be served are sent by mail, they must be mailed by the clerk. A fee to the clerk for this service is prescribed by Rule 30 of the “General Orders in Bankruptcy,” and by the memorandum appended to Form No. 52, the certificate of the * clerk as to the mailing of the notices and the placing thereon of the proper postage-stamps is made evidence of the fact of notice. The proof of publication in the newspapers may, as in other cases, be by the usual affidavit of the printer.

In a case where no debts have been proved against the bankrupt or no assets have come to the hands of the assignee, if the second and third meetings of creditors required by the 27th and 28th sections of the act, have not yet been held, the order to show cause in Form No. 51 should contain the direction provided for by Rule 25 of the “General Orders in Bankruptcy” in regard to such second and third meetings, and the notice — Form No. 52 — published and served in pursuance of the order should have added to it the clause provided for by said Rule 25, in regard to such second and third meetings.

This power of the register to act on the return of the order to show cause on the petition of the bankrupt for his discharge, is deducible from the provision of section 4 of the act, that the register shall have power, and it shall be his duty, “to pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose.” Form No. 53 contemplates that if a creditor opposes a discharge, he may address to the register the specification in writing of the grounds of opposition required by section 31 of the act. If, under Rule 24 of the “General Orders in Bankruptcy,”

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no creditor enters an appearance in opposition to the application for a discharge by the day when the creditors are required to show cause, the register may require the bankrupt to take and subscribe the oath provided for by section 29. Whether there be or be not opposition to the discharge, the register must furnish to the court after the return day of the order to show cause, and before the court will either grant a discharge or try any question raised as to the discharge, a certificate to be made by the register, that he has examined carefully all the proceedings in the case, and that it appears to him from those proceedings that the bankrupt has in all things conformed to his duty under the act, and has conformed to all the requirements of the act.

The provisions of section 32 of the act as to the prerequisites to a discharge mean, that all the requirements of the act as to what steps are to be taken from the commencement of the proceedings to the end, must be conformed to as prerequisites to the granting of a discharge, and not merely that the bankrupt has personally done what he is required to do. Claiming, as the bankrupt does, the benefit of the act, he is made responsible for the regularity of the proceedings, and he is bound to see, as the case proceeds, that all the necessary steps are taken, and regularly taken, or else he cannot have his discharge.

The register will, therefore, with a view to making the certificate in question, examine carefully all the steps in the case, and if he finds any want of conformity to the requirements of the act, he will specify what it is, so that the defect may be supplied, if it can be.

As this is a service involving care and responsibility, the clerk will in every case where a petition for discharge is filed hereafter, enter a special order referring it to the register in charge of the case to make an order to show cause therein, and to sit in chambers on the return thereof, and pass the last examination of the bankrupt if there be no opposition, and certify to the court whether the bankrupt has in all things conformed to his duty under the act, and has con-

In re Charles G. Patterson.

formed to all the requirements of the act. In rendering these services the register will be considered as acting under the special order, so as to entitle him to be compensated for such services under that clause in section 47 of the act which gives to the register, "for every days' service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court."

The regulations announced in this decision will be considered as standing rules of this court in cases in which petitions for discharge shall be hereafter filed.

It must also be understood that no discharge will be granted until, under Rule 7 of the "General Orders in Bankruptcy," all the papers relating to the case are filed by the register in the office of the clerk of the district court.

The clerk will certify this decision to the register, Isaiah T. Williams, Esq., and he will act on the petition for the discharge in this case in accordance with the above regulations, and the clerk will enter a special order in this case to the effect above prescribed.

September 25, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

Scheduled creditors filed proof of debt, and made motion for an order to examine bankrupt, before the day of first meeting of creditors. Bankrupt objected. Register granted motion after argument, and bankrupt moved the question be adjourned for decision by the court. Questions and issue were tendered, but the creditors declined to receive same or join issue. Register then declined to grant motion of bankrupt, who objected to his action, and thereupon requested questions to be certified to the judge.

Held, That the objection of the bankrupt to the motion for his examination raised an issue of law, which the register should have adjourned for the judge's decision, without any request; but such adjournment was a proceeding that might be waived, and it was waived by the bankrupt submitting the matter upon argument for the register's decision, which disposed of it. No obligation rested on the register after such decision to adjourn the points of the bankrupt into court.

That the creditors were entitled to prove their claim before the day of first meeting and had a right to make the motion for examination.

That the register was not bound to notify the bankrupt, or his attorney, of the filing by the creditors of their proof of debt before allowing and entering the

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same, prior to the first meeting, but the court has full control of the debts and proofs, and the bankrupt has his right to object, to the validity thereof at the first meeting of creditors.

In re CHARLES G. PATTERSON.

BLATCHFORD, J. In this case an adjudication of bankruptcy was made September 12th, 1867, and a warrant was issued to the marshal, returnable October 23. On the 23d of September, Tupper & Beatty, creditors on the debtor's schedules, filed a proof of debt. On the 25th of September, Tupper & Beatty made a motion before the register for an order for the examination of the bankrupt under section 26 of the act, and according to Form No. 45. The bankrupt objected to the granting of the order, on the ground that the order could not be made before the first meeting of creditors. After argument the register granted the motion. Thereupon the bankrupt moved that the question be adjourned into court for the decision of the judge, under the provisions of section 4 of the act, and tendered his questions and issue to the creditors, in order that they should state their points, and that, issue of law being thus joined, the same might be adjourned into court by the register for decision by the judge, as provided for in the 4th section of the act. To this tender the creditors objected, and they declined to receive the questions, or to join in the issue, on the grounds that their motion had been granted, and that there was no question or issue of law raised, inasmuch as section 26 of the act provided distinctly that the court might, on the application of any creditor, at all times require the bankrupt to attend and submit to examination; and that if the bankrupt wished to raise the question of the register's power to make the order before the return of the warrant, he could take the opinion of the judge by a certificate of the register, under the provisions of section 6 of the act. The register declined to grant the motion of the bankrupt to adjourn the question into court, inasmuch as there was no issue joined, and decided that the proper course under the law, if the bankrupt questioned the right to make the order for examination before

In re Charles G. Patterson.

the warrant was returned, and desired to take the opinion of the judge thereon, was to do so by a certificate of the register, under the provisions of section 6 of the act. The order requires the examination to take place on the 9th of October. The bankrupt objected to the action of the register, and requested four questions to be certified to the judge, which has accordingly been done by the register.

1. Whether the matter of granting the motion for an order for examination should not have been adjourned into court for the decision of the judge; and whether, after the bankrupt had tendered his points at issue, the register did not err in granting the motion, and in refusing to adjourn the same into court for the decision of the judge.

As regards this question, the register states that he thinks that it was not necessary to adjourn the matter into court, firstly, because issue was not joined between the parties; secondly, because section 6 provides a sufficient, and the most usual way, to take the opinion of the judge on the point, without suspending proceedings in the matter.

The question of granting the motion for an order for examination ought to have been adjourned into court for the decision of the judge. The fourth section of the act requires that "in all matters where an issue of fact or of law is raised and contested by any party to the proceedings" before the register, "it shall be his duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge." Now the objection made by the bankrupt, before the register, to the granting of the order for examination on the ground that the order could not be made before the first meeting of creditors, raised an issue of law, which was contested. That issue it was the duty of the register to adjourn into court for decision by the judge. Instead of doing so he granted the motion, and thus decided the issue of law himself. But
xxiii the bankrupt, * after raising the issue of law, appears to have argued it and submitted it for decision to the register, without requesting the register to adjourn it into

In re Charles G. Patterson.

court, and without objecting to its decision by the register. The granting by the register of the motion of the creditor disposed of the question, and after that there was no issue or question to be adjourned. It is the duty of the register to adjourn an issue of law into court without any request to that effect by a contesting party. But still such adjournment is a proceeding which a contesting party may waive, and where he does waive it by submitting the decision of the issue to the register, he cannot, after finding that the question is decided against him by the register, then ask to have it adjourned into court. If instead of virtually requesting the register to decide the issue, by arguing the question and awaiting the register's decision, the bankrupt had, on raising the issue requested the register to adjourn it into court, the case would have presented a different aspect. But as it was, the tendering by the bankrupt of his points after the decision, imposed upon the register no obligation to adjourn them into court.

2. Whether under the bankrupt law, Tupper & Beatty are creditors who have proved their claim so as to entitle them to make the motion.

In regard to this question the register states that he considers Tupper & Beatty to be creditors who have proved their claim, they having fulfilled all the requirements of the law, and there being no restriction as to the time when the claim may be proved after proceedings are commenced ; that the first meeting of creditors is for the choice of an assignee by those who have proved their claims ; that he can see no reason why creditors should wait until the return day of the warrant to make their proofs ; that the debt which exists is the basis of the right to appear as creditor, and that creditors should be allowed to judge for themselves as to when they will take advantage of the law and appear.

I concur with the register in these views. The creditors in this case, having proved their claim, had a right to make the motion.

3. Whether, before the day appointed for the first meeting of the creditors, a creditor can, under the act, prove his claim

In re Charles G. Patterson.

and so become a party to the proceedings in bankruptcy, as to be entitled to an order for the examination of the bankrupt under the 26th section of the act.

In regard to this question the register states that he thinks that when once a creditor has proved his claim, he has, unless the same be questioned, full right under the law, and may, at any time, call for an examination of the bankrupt.

The register is correct in this conclusion.

4. Whether, if in the interval between the issuing of the warrant in bankruptcy and the day appointed for the first meeting of the creditors, and for proof of claims and for choice of an assignee, a deposition in proof of claim against the bankrupt is filed, it is not the duty of the register to notify the bankrupt or his attorney before allowing the same, and entering it upon the list, — Form No. 13, — so that objection to the proof thereof may be made, if any exist, under section 23 of the act.

In regard to this question the register states that he does not think that the bankrupt need be notified of the filing of claims prior to the first meeting of creditors; that it is a matter of no consequence to him whether creditors file them before or after, and that the bankrupt having surrendered all his property for the benefit of all his creditors, could, with perfect propriety and honesty, leave all questions connected with his estate to them, without regard to what disposition is made of it.

It is not the duty of the register to notify the bankrupt or his attorney before the first meeting of creditors of the filing of such depositions in proof of claims as may be filed before such first meeting. Notwithstanding the filing of such a deposition before such first meeting and the entering of the claim on a list, — Form No. 13, — the register may still at such first meeting, under section 23, postpone the proof of the claim and exclude the creditor from voting in the choice of an assignee. The court has, under section 22, full control at all times of debts, and all proof of debts, even after the depositions in proof have been filed, and the bankrupt can,

In re Samuel W. Levy & Mark Levy.

at the first meeting of creditors, object, under section 23, to the validity of and the right to prove any debt, no matter whether the deposition in proof thereof is filed at such first meeting or was filed previously.

The clerk will certify this decision to the register, James F. Dwight, Esq.

October 2, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

In an examination of bankrupts by creditors under section 26 of the act, where questions are objected to, the register will pass upon the same, and permit the parties to take formal exceptions to his rulings. At the close, motion to strike out specified points, or to have excluded questions answered, will be entertained, and the questions be certified for decision by the judge, and proceedings thereafter be had in accordance with such decision.

In re SAMUEL W. LEVY & MARK LEVY.

THE creditors of the above bankrupts being before the register examining the bankrupts under the provisions of section 26 of the act, the counsel of the bankrupts interposes various objections to questions put by the counsel for creditors, such as, that they were immaterial, &c. The question at once arises whether the register has the right to pass upon these questions.

The counsel for the creditors insists he has the right to put any questions he sees fit, and that the register must take the answers, as in the case of an examiner in chancery. The counsel for the bankrupt insists that the objections must be passed upon by the register, with the right of either counsel if he sees fit to demand that the questions be certified to the judge. The register says:

The matter presents many difficulties and embarrassments. It is true, as appears by reference to English adjudications, that the largest liberty of examinations should be allowed, and a question will, perhaps, rarely be ruled out. Yet it would seem that there should be some discretion exercised by the register to prevent abuses. The case is quite different,

In re Samuel W. Levy & Mark Levy.

so far as the rights and interests of the parties are concerned, from that of testimony taken before an examiner in a suit in chancery ; it is open to greater abuses, and the field of inquiry is larger. The matters to be inquired about are often of a more delicate and private nature, affecting household expenses and family matters of every character. The state of feeling between the parties is apt to be more rancorous. A creditor who feels that the bankrupt has squandered in luxuriant living property that ought to have been applied to the payment of his claim, is not likely to spare the feelings of the family, or to omit to drag to light those thousand little family secrets which the good of society as well as of order and good breeding require rather to be suppressed.

It is impossible for a register to sit and give free run to inquiries of this nature, and those of a similar character, without a sense that public decorum is being violated, and sometimes that a bankrupt is imposed upon and wronged, and his own as well as the time of others, uselessly and more than uselessly wasted.

On the other hand, the bankrupt is often evasive in his answers, vague and unsatisfactory in his statements. The creditor claims a categorical answer ; the bankrupt insists that he has given it, and questions of a similar character are constantly arising.

Between these two opposing parties, the examination would often come to stand still, on the pretence, or otherwise, that the opinion of the court was desired, and thus great delay, waste of time, and vexation would seem to be almost inevitable.

After some consideration, I adopted the following course : I directed the parties to proceed with the examination, and I would pass upon every objection, and the parties might take formal objections ; then at the close of the testimony, upon a motion to strike out specified points so objected to, or that excluded questions may be answered, I would certify the questions to the court, and upon the coming in of the judge's decision I would proceed to strike out or allow the questions to be answered as the opinion should indicate.

In re Samuel W. Levy & Mark Levy.

This course was readily accepted by the respective counsel, and I have pleasure in certifying that it seems to work well. I am sure it shortens the examination. It makes the counsel more exact and circumspect, and I think has the effect to bring out facts with more exactness, and with more method.

If, upon reflection, the court should deem this practice allowable, and will so signify its opinion, the practice will easily become uniform among the registers.

That it is allowable under the act, the court is referred to the 4th section, where it is provided that the register may "sit at chambers, and dispatch there such parts of the administrative business of the court and such uncontested matters as shall be defined by general rules and orders, or as the district judge shall in any particular matter direct."

The decision of the court upon this certificate may be regarded as such general rule or order in this matter.

BLATCHFORD J. The views and practice of the register as above set forth, are approved, and this decision will be regarded as a general * rule or order that such xxiv practice be followed by the registers.

The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

October 1, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where an examination of bankrupts by creditors had been commenced and adjourned over, and the assignee summoned a witness in the mean time for examination as to bankrupt's property, without notice to bankrupts :

Held, It was not necessary to give notice to bankrupts of time and place of examination of witness, and the same could be proceeded with without reference to the examination by creditors.

In re SAMUEL W. LEVY & MARK LEVY.

IN this case the register says : That in the proceedings in said cause before him, the following questions arose pertinent to said proceedings, and was stated by the counsel for the op-

In re Samuel W. Levy & Mark Levy.

posing party, to wit: Mr. Samuel Boardman, who appeared for the bankrupt, Mr. C. H. Smith appearing for the assignee.

The assignee, Mr. Sedgwick, by Mr. C. H. Smith, his solicitor, applied to the register for a summons (Form 48), directed to William Secor, requiring him to appear before the said register and answer concerning the bankrupt's property at a time therein specified. At the time so specified the said witness appeared pursuant to said summons, Mr. Smith and Mr. Boardman also appeared for the parties aforesaid. Whereupon Mr. Boardman objected to the examination of the witness, and filed his objections in the words following, to wit:

*" In re Samuel Levy and } BANKRUPTS.
Mark Levy.*

" The petitioners herein by their solicitors, Benedict & Boardman, object to the examination of the witness, William Secor, at the present time, upon the following grounds:

" 1st. That no notice of the time and place of the proposed examination has been given to the petitioners or their solicitors.

" 2d. That an examination of the petitioners under section 26 of the act being now pending, and the proceedings on said examination before the register having been regularly adjourned to the 26th day of September, 1867, at 1 P. M., no examination of the bankrupts or witnesses can take place except upon such adjourned day without the consent of, or reasonable notice given to the bankrupts or their solicitors.

" 3d. That the examination of witnesses under section 26 of the act being a proceeding in the matter, the bankrupts or their solicitors are entitled to reasonable notice of the time and place of such examination, so as to enable them to be present and to have an opportunity to cross-examine the witnesses produced.

" 4th. That to allow the examination of witnesses to proceed except upon the regular adjourned days or times agreed

In re Samuel W. Levy & Mark Levy.

upon, or of which due notice has been given, would lead to confusion, and might and would result in great injustice to the petitioners.

(Signed) "BENEDICT & BOARDMAN,
" *Solicitors for petitioners.*

"September 20, 1867."

After hearing the parties, the register decided to certify the points made by Mr. Boardman to the courts for decision, but did not consider it a proper course to adjourn the examination until the coming in of the decision, as he thought no harm could come to the bankrupt from proceeding, and was given to understand that a loss might ensue if the testimony were not at once taken. The examination proceeded accordingly.

As to the objections made by Mr. Boardman, the register says he thinks that when put as questions to the court they amount to the following:

First. When an assignee desires to examine a witness for the purpose of discovering property (an assignee can have no other object in examining a witness or a bankrupt, and probably would not be allowed to use his office to get testimony to defeat the bankrupt's application for a discharge), is it necessary to give notice to the bankrupt of the time of such examination?

Second. When the creditors have commenced an examination of parties and witnesses before a register, and the further examination stands adjourned over to a future day, may the assignee, in the mean time, and before the adjourned day, come in and examine a witness, or must he wait until the adjourned day and then proceed?

As to the first question, it is not without difficulty. On the one hand it would seem to be of no just concern to the bankrupt to oppose an assignee in finding and obtaining his assets, and clearly he cannot complain if the assignee does not require his aid. On the other hand, as the examination taken by an assignee on such an occasion must be returned to the court with the other papers in the case, and will com-

In re Samuel W. Levy & Mark Levy.

prise a part of the record in such case (see act, section 26, also General Order 7), it is clear that it may be read and referred to on an argument before the court by a creditor opposing the discharge of the bankrupt, and thus made testimony against the bankrupt, although he should have had no opportunity to cross-examine the witness. This would seem to be unjust; yet neither the act nor the general order in terms require a notice to be served upon the bankrupt or his solicitor, even in case the examination is by a creditor for the purpose of defeating the application for a discharge. The words "in like manner" in section 26, referring to the preceding words "upon reasonable notice," in the same section, refer to the witness and not to the bankrupt or his solicitors. It can hardly have been the intention of congress to allow a creditor to proceed and take testimony before a register for the purpose of defeating the bankrupt without giving notice, and thus enable him to cross-examine the witness. It was probably left to the court to regulate the practice by an order, and has been overlooked by the court.

It might be inconvenient for the assignee to give notice to the bankrupt or his solicitor in all cases; and in a case where he had reason to fear collusion between the witness whom he desired to examine, and the bankrupt, it might not be expedient to give such notice to the bankrupt. If he is at all times entitled to notice from the assignee, then it would be competent and perhaps just to adjourn the examination to suit the convenience or pretended convenience of the bankrupt or his solicitor, and thus, in case of collusion, the whole purpose of the examination might be defeated.

Judging from my own experience, I think the injury likely to be done to the bankrupt by the omission to give him notice of an examination by the assignee, and the loss of an opportunity to cross-examine the witness, would not be so great as that which would be likely to flow from an opposite course. In case testimony injurious to the bankrupt were so taken, it would be competent for the court on the trial to allow him to recall the witness for cross-examination. Be-

In re Isidor Lyon.

sides, the register would be careful that the assignee's name should not be used by creditors for the purpose of getting in testimony clandestinely to defeat the bankrupt's discharge.

As to the second question, it will be observed that the proceedings pending were proceedings by *creditors*; this is a different proceeding by the *assignee*. I don't see that one proceeding should be affected by the other.

BLATCHFORD, J. It was not necessary to give notice to the bankrupts of the time and place of the examination of the witness on the summons applied for by the assignee.

The examination of such witness was an independent proceeding, and could be proceeded with without reference to the examination on the part of the creditors.

The clerk will certify this decision to the register Isaiah T. Williams, Esq.

October 3, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

In the examination of a bankrupt by creditors, the register will pass upon questions objected to, and formal exceptions being taken, he will, at the close of the testimony, entertain motion to strike out answers or admit excluded questions, and certify the questions to the court.

In re ISIDOR LYON.

IN this case the register certifies the following questions to the court :

Order having been made by consent for the examination of the bankrupt on the 25th day of September, 1867, at 3 o'clock, and the bankrupt being duly sworn and examined, the following questions were asked by Mr. Gray :

Question. "Where do you get the means to support your family?" *A.* "By earning my living. No particular business. Anything I can find. I don't know exactly how long I have been engaged in that business. I have always made money when I could do so legitimately."

Question. "What was the last legitimate act of business

In re Isidor Lyon.

you transacted by which you made money?" A. "To-day; selling a barrel of spirits, as a broker, not belonging to me."

Question. "For whom?" Objected to by the bankrupt's counsel.

The register thinks it ought to be answered. If the spirits did belong to another, the subject is ended. If the deponent is in any way mistaken, and the spirits in fact belonged to him, the creditor should be allowed to discover it.

Mr. James, the bankrupt's counsel, demands that the question thus made be certified to the judge.

xxv *Question.* "What was the other and last * previous transaction to the one mentioned in which you made money?"

Mr. James objects to this question on behalf of the bankrupt, on the ground that no inquiry is relevant as to the manner in which he has earned his livelihood since his adjudication of bankruptcy, unless foundation is laid for imputing to him possession of property which ought to be given up to his assignee.

The register thinks the interrogatory a proper one, as tending to discover and ascertain the truth in respect to that which the counsel thus allows. Mr. James demands that the question be certified to the judge.

BLATCHFORD J. The register will follow the practice established by my decision dated October 1st, 1867, in the matter of Samuel W. Levy and Mark Levy, bankrupts. (*Ante*, page xxiii.)

The clerk will certify this decision to the register, Edgar Ketchum, Esq.

October 7, 1867.

In re John Bellamy.

U. S. DISTRICT COURT, S. D. NEW YORK.

The special order referring a petition for discharge to the register is necessary. Form No. 4 is a general order of the district court, made in each case under General Order 5, and is not a special order.

When notices (Form 52) are served by mail, the clerk must mail them.

The order in Form 51, although the register is to direct it to be issued, is to have the signature of the clerk and seal of the court.

The register, on directing order (Form 51) to issue, shall forthwith transmit to the clerk a list of all proofs of debt furnished to the register or assignee, containing names, residences, and post-office addresses of creditors, with sufficient particularity to insure proper service of notice (Form 52).

*In re JOHN BELLAMY.*¹

IN this case the register says :

In the opinion delivered by your honor in this case (*ante*, xxi.) when last before you, the clerk was directed to enter a special order referring it to me to examine, certify, &c. I wish to call your attention to the question whether such an order is necessary, whether the register may not continue under the first order of reference, and perform this last service in the case under that order.

If the first order is, in its nature, a *special* order, and is in its terms broad enough to cover all the services the register can be called upon to perform under the act, it would seem unnecessary, and perhaps lead to confusion, to require that another order should be entered, besides incurring additional expense.

That the first order is a "special" order within the meaning of the act, may be seen from the distinction which exists between what are defined to be "general" orders, and the order in question.

The act, section 10, provides that the justices of the supreme court shall make "general orders;" and they have done so, thirty-three in number, which orders are called "General Orders in Bankruptcy."

This may, I think, be regarded as a statutory definition of

¹ Cited in *Dean's case*, 1 N. B. R. 27.

In re John Bellamy.

the term "general order," and of course is conclusive upon the question.

Adhering, then, to our statutory definition, we shall easily see what is a special order, to wit, "*all other orders*;" for when the statute confers a power upon a person or a body, such power is always held to be exclusive.

Besides, it would be impossible to call the order in question a general order, for it is special in the following particulars.

1st. It is directed to a particular person.

2d. It requires that person to act at a particular place.

3d. It requires him to act at a particular hour.

4th. It requires him to act in a particular case.

Again, General Order No. 5 expressly declares it to be a "special order."

As to the order in question being sufficiently broad, reference need only be had to the terms of it.

I hope your honor will reconsider so much of the opinion above referred to as relates to such special order, as I am sure it will be found inconvenient in practice.

I now beg to call your attention to one more point in the opinion above referred to.

You think the notices should be served by the clerk. I hope on a second view you may not think this the requirement of the statute, as it will be found practically most inconvenient.

The order that the creditors show cause why the bankrupt should not be discharged is made by the register to whom the case is referred. The creditors are to show cause before him upon a day by him to be fixed and specified in the order. That order remains before the register until the "final rendering up" of his papers to the court. How, then, is the clerk to ascertain, save incidentally and from hearsay, when the notices are to be served, and at what time and when the creditors are to show cause. But if the clerk was ever so well instructed on these points, it often occurs that adjournments are granted, and changes are made as to the time of

In re John Bellamy.

the meeting, on application of the parties, or for other causes, such as the insufficient service of notices, &c. How is the clerk to be informed of all this? At best it must often lead to inconvenient misunderstandings and awkward mistakes.

Again, how shall the clerk know whom to notify? It is only those that have proved their claims before the register to whom the case is referred, who are entitled to notice. It is true that on the day of the first meeting of creditors the register makes out a list of those who have proved their claims, which he places on his file in the case, according to Form 13, a certified copy of which he delivers to the assignee with the depositions by which such claims are proved pursuant to the provisions of section 22 of the act, and this the register certifies to the court in due course. But claims may be thereafter proved, and indeed most generally are so proved, and may continue to be proved up to the moment of sending out the notices, and even after that up to the latest moment at which the notice would be good. How is the clerk to know of these? The register sends these proofs to the assignee, but his entry in his register of this does not reach the clerk till perhaps one or two days afterwards.

The case having been once committed to the register by the first order with directions to "take such proceedings therein as are required by the act," it would seem that an order should be entered nullifying the first order before the case could well go back to be acted on by the clerk, and by another order be recommitted to the register.

The note at the foot of Form 52 seems to be an error of the same character, that in Form 51 puts the seal of the court and clerk's name to the order to show cause. Nothing is clearer, as the court has already decided in this case, than that an order in the midst of the proceedings cannot with any propriety require the seal of the court. That order, instead of being so issued by the clerk under seal, is directed by this court to be issued by the register; and in conformity with this decision, it is clear that the certificate of service upon the creditors should be by the register also.

In re John Bellamy.

This view is in harmony with the provisions of section 27, which requires the register to "forward by mail to every creditor a statement of the dividend to which he is entitled."

I am sure that besides entailing a very considerable additional expense upon the bankrupt already, in theory of law, at least, poor enough, the practice will be attended by much inconvenience to all parties concerned, and will lead to a practice which will be found to be incongruous and awkward.

Desirous to contribute my daily experience to rendering the practical operation of a most wholesome and beneficial law, harmonious, convenient, and uniform, and sensible how difficult it will be to lift the practice in bankruptcy out of ruts once beaten, I have ventured most respectfully to submit the foregoing.

I. T. WILLIAMS,
Register in Bankruptcy.

BLATCHFORD, J. I regard the special order referred to as necessary, certainly so far as the requirement is concerned that the register shall examine and certify as to the regularity of all the proceedings, which is one of the principal points in the special order. That requirement is not covered by the order of reference, Form No. 4. Form No. 4, in referring it to the register "to take such other proceedings therein as are required by the act," means such other proceedings required by the act as it requires the register to take. The act does not require the registers to examine and certify as to the regularity of the proceedings with a view to the discharge, and it may be doubtful whether it requires the registers to make the order to show cause on the petition for a discharge. I therefore regard the special order as necessary.

Form No. 4 is not a special order, but is what Rule 5 of the "General Orders in Bankruptcy" calls a general order made by the district court in the case. That rule speaks of the power of the district court to make a general order "in each case," fixing the time when and the place where

In re John Bellamy.

the register shall act upon the matters arising under the case. Form No. 4, the order of reference, is such a general order.

If any inconvenience in practice shall result from the making of such special orders, and shall be brought to the notice of the court, the court will cheerfully consider the subject again. * But no such inconvenience is stated as xxvi having arisen.

I am satisfied that under Rule 30 of the "General Orders in Bankruptcy," taken in connection with the note at the end of Form No. 52, the clerk must mail the notice (Form No. 52) when it is served by mail. Such note is, I think, not an error. Nor is it an error to put the seal of the court and the clerk's name to the order to show cause in Form No. 51. I have not decided that an order in the midst of the proceedings cannot with any propriety require the seal of the court. The order in Form No. 51, although the register is to direct it to be issued, is to have the signature of the clerk, and the seal of the court.

It will be regarded as a standing rule that every register shall, immediately on directing an order to show cause (Form No. 51) to issue, transmit to the clerk a list of all the proofs of debt in the case which have been furnished to the register or the assignee, containing the names, residences, and post-office addresses of the creditors, with sufficient particularity to enable the notices (Form No. 52) to be served properly.

If the practice is expensive or inconvenient (which has not appeared), or shall hereafter appear to be expensive or inconvenient, the difficulty lies in the law and in the "general orders" framed by the supreme court, and not in their administration. This court can only apply and carry out the law and the rules as it finds them, according to its best judgment.

The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

October 11, 1867.

In re Henry Jacoby.

U. S. DISTRICT COURT, S. D. NEW YORK.

The bankrupt was held in custody by the sheriff of the city and county of New York, under three several orders of arrest. Four actions were pending against the bankrupt in state courts.

Held, That proceedings will be stayed, and the bankrupt will be discharged from arrest in proper cases, until the question of his discharge in bankruptcy shall be passed upon in the bankruptcy court. Testimony ordered to be taken and certified by a referee as to whether the actions were for claims that would not be discharged in bankruptcy.

*In re HENRY JACOBY.*¹

BLATCHFORD J. The order to show cause made herein on the 11th day of October, 1867, why Henry Jacoby, the above named bankrupt, should not be discharged from the custody of the sheriff of the city and county of New York, under three several orders of arrest named therein, and why all further proceedings in the four several actions named should not be stayed to await the determination of this court in bankruptcy upon the question of the discharge of said Henry Jacoby, having come on to be heard, and it appearing that a copy of the said order to show cause had been duly served upon Messrs. Capron & Lake, two of the attorneys therein named. Now, after hearing Aaron Frank, Esq., for the motion, and Charles H. Smith, Esq., Charles H. Van Brunt, Esq., and Samuel Hirsch, Esq., in opposition thereto, it is ordered that the said Jacoby be and he is hereby discharged from the arrest and imprisonment under which he is held by the sheriff of the city and county of New York under the order of arrest made in the action in the court of common pleas in and for the city and county of New York, wherein Lazarus Hallgarten is plaintiff, and Henry Jacoby and another are defendants, and that all further proceedings in the said action be and the same hereby are stayed to await the determination of this court in bankruptcy on the question of the discharge of said Jacoby. And it is further ordered that all further proceedings in the

¹ Cited in *Wright's case*, 2 N. B. R. 58, *quarto*.

In re John Bellamy.

action now pending in the supreme court of the state of New York in and for the city and county of New York, wherein John A. Lockwood is plaintiff, and Henry Jacoby and another are defendants, be and the same hereby are stayed to await the determination of this court in bankruptcy on the question of the discharge of said Henry Jacoby.

And it is further ordered that in the action in the supreme court of the state of New York, in and for the city and county of New York, wherein Oliver E. Wood, Israel A. Barker, and John Maxwell are plaintiffs, and Henry Jacoby and another are defendants, it be referred' to Joseph Gutman, Jr., Esquire, a commissioner of the circuit court of the United States for the Southern District of New York, as a referee, to take and certify evidence upon the question as to whether or not the said action is founded on a debt or claim created by the fraud or embezzlement of the said bankrupt or by his defalcation as a public officer, or while acting in any fiduciary character, and to report thereon with all convenient speed. And it is further ordered that in the action in the supreme court of the state of New York in and for the city and county of New York, wherein Solomon Mannes is plaintiff, and Henry Jacoby and another are defendants, it be referred to the said Gutman, as a referee to take and certify evidence upon the question as to whether or not the said action is founded on a debt or claim created by the fraud or embezzlement of the said bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, and to report thereon with all convenient speed. And it is further ordered that all parties shall have due previous notice of all proceedings before said referee hereunder, and the opportunity of attending before him, and shall be at liberty to examine the said bankrupt and any other witnesses in the premises, and that all further proceedings in the said last named two actions, except such as relate exclusively to the holding of the said Jacoby in custody under the said orders of arrest therein, be and the same are hereby stayed to await the determination of this court in bankruptcy on the question of the discharge of said Jacoby.

In re Davis & Son.

U. S. DISTRICT COURT, N. D. OHIO.

A creditor of a bankrupt holding a claim wholly or partially secured, may prove the same in bankruptcy, but cannot vote for assignee.

In re DAVIS & SON.

THE question arose in this case before the register whether a creditor holding a claim fully or partially secured should be allowed to vote for an assignee. The question was certified to Judge Sherman, as follows, by Myron R. Keith, one of the registers of said court in bankruptcy :

In the course of proceedings in said matter before me, the following questions arose pertinent to said proceedings, and were stated and agreed to by the counsel for the opposing parties, to wit : J. M. Jones, who appears for the bankrupt, and Payne & Wade, who appear for the creditors of said bankrupt.

The facts are : A. C. Gardner, a creditor of said bankrupt, has proved his claim before the register, as a claim secured by mortgage on real estate, and the question arising is this :

Under the provisions of the bankrupt act, should a creditor, holding a claim fully or partially secured, be allowed to vote at the first meeting of creditors in the election of an assignee ?

Section 13 provides that the creditors shall, at the first meeting held after due notice from the messenger, in the presence of a register designated by the court, choose one or more assignees of the estate of the debtor, the choice to be made by the greater part in value and in number of the creditors who have proved their debts.

Section 23 provides that the court shall allow all debts duly proved, and shall cause a list thereof to be made and duly certified by one of the registers.

Section 20 provides that when a creditor has a mortgage or

In re Davis & Son.

pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property to be ascertained by agreement between him and the assignee or by a sale thereof to be made in such manner as the court shall direct.

Section 13, above referred to, allows all creditors who have proved their debts to participate in the choice of an assignee. The certified list of creditors required by section 23, is for the purpose of spreading upon the record a statement of the names of all admitted as creditors, and the amount due to each.

Section 20, in my opinion, so far as voting for assignee is concerned, limits the creditors to those who are not secured, for it provides that creditors holding security shall *be admitted as creditors* only for the balance of their debts, after deducting the value of the security, and that value can only be determined by agreement between him and the assignee, or by sale of the property which cannot be agreed on between them, or ascertained by sale until after the assignee is chosen.

I am therefore of the opinion that a creditor holding security, although he has proved his debt as provided in the 22d section of the bankrupt act, cannot vote in the election of assignee.

And the said parties requested that the same should be certified to the judge for his opinion thereon.

M. R. KEITH, *Register.*

SHERMAN, J. I concur with the register in the opinion by him given, on the question above stated, and approve the same.

Anonymous Cases.

U. S. DISTRICT COURT, DISTRICT OF COLUMBIA.

If no creditors have proved their debts, and no assets have been received by the assignee at the time the bankrupt applies for his discharge, the only notice which can be given is by publication, at the discretion of the court.

Although no creditors have proved their debts, and there are no assets, an assignee should nevertheless be appointed.

A debt due a firm should be scheduled as due the firm under the name and style by which it is known, without designating the individual members thereof.

Every creditor is entitled to notice of the proceedings in bankruptcy. A notice not addressed to a creditor by his name is no notice at all.

The error may be cured by issuing and serving a new and correct notice.

A debtor is not required, in making up his schedules, to use the entire list of forms, but may use only those which are appropriate. He should state why the blanks are omitted.

Where a debtor who has assets makes advancements as security for fees to the clerk, register, and marshal, he is not to be reimbursed by the assignee out of the estate.

The assignee should be credited with the fee so paid, and not the petitioner.

IN divers cases before J. Sayles Brown, register in bankruptcy, District of Columbia, the following questions arose, and having been certified to Judge Wylie, his opinion on each question is appended.

Of Notice to show cause why Discharge should not be granted.

If at the time the bankrupt applies for his discharge no creditors have proved their debts, and no assets have come to the hands of the assignee, is notice to show cause required, and, if so, what notice?

WYLIE, J. In such case, the only notice which can be given is that by publication, and such notice is, I think, required by the law. The length of time, and the number of newspapers for the publication, have not been prescribed in the act, but are to be fixed by the court, according to its discretion in each case.

Disposition of Balance of Deposit of \$50.

If a balance of the deposit remains in the hands of the register at the close of a case in bankruptcy, to whom shall

Anonymous Cases.

he pay it? Is it the property of the assignee or of the bankrupt?

WYLIE, J. It would be part of the assets, and should be paid to the assignee.

Appointment of Assignee, no Debts proved, and no Assets.

When no creditors have proved their debts, and there are no assets, should an assignee be appointed?

WYLIE, J. I think an assignee should be appointed, nevertheless. There may be creditors who have not proved their debts, and the assignee might find assets which the petitioner may have overlooked.

Judgment Debts due Firms need not be scheduled to Individual Members of said Firm.

When a petitioner owes a judgment debt, contracted with a firm composed of several individuals, should the debt be scheduled as due the firm under the name and style by which it is known, or should the individual names of the persons comprising the firm be set out as creditors; or should the individual names comprising the firm be given, and then add, — Partners comprising the firm of A. B. & Co. Which of these forms are admissible, and which is the best practice?

WYLIE, J. Either one of these forms would be good; but the first is the best, for the petitioner might be mistaken as to some of the members of a partnership, or might in fact be ignorant as to the membership of some of the partners. That is his risk, however. It is safest merely to return the partnership debt as due to the firm without naming the individual partners.

Service of New Notice in cases of Defective Notice — Appearance of Creditor on Defective Notice — Waiver.

When in issuing the warrant or in serving the notices for the first meeting of creditors a mistake has been made in the name of one or more of the creditors, so that he is not addressed by his true name, and there is not time after the dis-

Anonymous Cases.

covery of such defect to send notice, may such failure of notice be cured, and if not cured, will it be ground for denying the bankrupt a discharge from the debt due such unnotified creditor?

WYLIE, J. Every creditor must have notice served upon him in the manner prescribed by the act, otherwise he will not be bound by the proceedings. A notice not addressed to a creditor by his name amounts to no notice. The only way in which to cure such error is by issuing and serving a new and correct notice, unless the creditor will voluntarily appear and waive the notice, which, of course, will bind him.

Only such Forms and Schedules as are requisite to set forth Assets and Liabilities truly need be used.

When a petitioner in bankruptcy has no property except what he claims as exempt, and his creditors are all under one class, — as for example, creditors whose claims are unsecured, — is the debtor required, in making up schedules of his debts and estate, to use the entire list of forms in all cases laid down in the general orders and forms of proceedings in bankruptcy adopted by the supreme court of the United States, or shall he use such only of said forms as are appropriate to, and descriptive of, the debts and property he is to list?

WYLIE, J. The petitioner is required to use such only of the forms as are appropriate to and descriptive of the debts and property he is required to list. It would be absurd to require him to file in addition thereto a large mass of forms, all of which are simply blanks. He should state, however, the reason why these were omitted.

Payment of Fees by Voluntary Petitioner — Disbursement by Assignee.

When a petitioner in bankruptcy, who has assets, has made advances as security for fees to the register, the clerk, and the marshal, is he to be reimbursed by the assignee out of the estate for these expenses?

In re Charles G. Patterson.

WYLIE, J. He is not. The money he advances is not his own, but should be returned as a part of petitioner's assets and handed over to the assignee. The assignee should be credited with the fees so paid, and not the petitioner.

U. S. DISTRICT COURT, S. D. NEW YORK.

Bankrupt filed his petition to be adjudicated a bankrupt on the 25th of June, 1867, and was so adjudicated on September 12th, following. During his examination before the register by creditors, he testified to receiving \$5,000 about August 25, 1867, and being asked what became of it, objected to the question, which objection the register overruled. The bankrupt requested that the question so raised be adjourned for the decision of the court, and the register declined. A special case was thereupon made and submitted by the attorneys of the bankrupt and creditors respectively.

Held, That the register was correct in declining to adjourn the question into court as an issue of law.

Only such property as the bankrupt had at the time of the commencement of proceedings in bankruptcy passed to and vested in the assignee.

The time of filing the petition to be adjudicated a bankrupt was the time of the commencement of proceedings in bankruptcy. *Semble* — The same rule applies to involuntary cases where creditors file petitions and adjudication follows.

Bankrupt cannot be examined touching property acquired by him after filing his petition to be adjudged a bankrupt.

In re CHARLES G. PATTERSON.¹

BLATCHFORD, J. This is a special case stated for the opinion of the court in this matter under section 6 of the act. It is signed by the attorneys for the bankrupt, and the attorneys for Tupper & Beattie, creditors who have proved their debts, and it is certified by the register, under General Order No. 11, to contain questions raised before him in the proceedings in this matter.

The examination of the bankrupt was proceeding before the register, and the bankrupt testified that he received a sum of \$5,000 about the 25th of August, 1867, which he then borrowed from one Charles Kirby, and which he had

¹ Cited in *Rosenfeld's case*, 1 N. B. R. 60, and in *Levy's case*, *post*, xxxii.

In re Charles G. Patterson.

not repaid. Thereupon the creditors asked him this question: "Where is it?" The question was objected to by the bankrupt, and the register overruled the objection. The bankrupt answered: "It has been mostly spent — used." He was then asked: "How much of it has been spent?" To this question the bankrupt objected on the ground that, as matter of law, the examining creditors had no right to inquire of the bankrupt as to any property in his possession which was acquired after the commencement of the proceedings in bankruptcy under which his examination was had, and that, if they had that right, it was exhausted by previous interrogations put and answered. The bankrupt then requested the register to adjourn the question into court as an issue of law to be decided by the judge under section 4 of the act. The register declined to adjourn the question into court, and decided that the question should be answered. It is agreed that the records and files in the case are a part of the special case. It is also agreed that the following questions are presented to the court: (1.) Was the register correct in declining to adjourn the question into court as an issue of law? (2.) Were the questions above set forth admissible?

For the reasons set forth in my decision, made herewith *In the Matter of Samuel W. Levy & Mark Levy*, I hold that the register was correct in declining to adjourn the question into court as issue of law.

A decision on the second question presented by the special case, involves a decision as to the time when the line is to be drawn between property which does, and property which does not pass to the assignee in bankruptcy.

xxviii * In the present case the chronology of the case is as follows: On the 25th of June, 1867, a petition with schedules was filed. On the 27th of June the register examined the same and found them deficient. Proceedings were adjourned from time to time until the 8th of August, on which day the register, on the application of the petitioner, duly verified, made an order that he have leave to file amended

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schedules A and B to his petition, by filing and substituting new and complete schedules. On the 19th of August new and complete schedules A and B, comprising the whole eleven of the sheets composing schedules A and B in Form No. 1, were filed, accompanied by oaths to the new schedules, but no new petition was filed nor any amendment to the petition. On the 6th of September the register examined the substituted schedules, and certified the same to be incorrect in form, and deficient. On the 10th of September the register made an order giving leave to the petitioner to file amendments to his substituted schedules. On the 11th of September the petitioner filed an amendment to schedule A No. 2, and one to schedule A No. 3, duly verified. On the 12th of September the register examined the petition and schedules, and certified the same as amended to be correct, and made adjudication of bankruptcy and granted a certificate of protection. On the 13th of September the register issued a warrant to the marshal returnable October 23d. On the 23d of September the proof of debt by Tupper & Beattie for \$7,952.66 was received and filed by the register. On the 25th of September the register, on the application of Tupper & Beattie, made an order returnable October 9th for the examination of the bankrupt. This order fell through for want of service, and another order was made returnable October 15th, under which the bankrupt attended before the register on that day, and his examination has proceeded.

It thus appears that the petition was filed on the 25th of June, the money inquired about was borrowed and received by the bankrupt on the 25th of August, and the adjudication of bankruptcy was made on the 12th of September. An assignee was elected by the creditors on the 23d of October at their first meeting, and his choice has been approved by the register and the judge, and he has accepted the trust.

It is insisted by the creditors that everything which was the property of the bankrupt on the 12th of September, at the time the adjudication of bankruptcy was made, passed to the assignee when he was appointed; and it is contended by

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the bankrupt that nothing passed to the assignee which became the property of the bankrupt after the 25th of June, when his petition was filed. If the latter view is the correct one, the questions in regard to the \$5,000 were improper. If the former view is the correct one, the questions were proper. The whole subject has been orally argued before me by the counsel for the respective parties.

The 14th section of the act provides that the assignment to be executed to the assignee "shall assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee." The intent and purport of this provision is, that the property which was the property of the bankrupt at the time of the commencement of the proceedings in bankruptcy, and no other property, shall vest in the assignee, and shall vest in him as of the time of the commencement of such proceedings, no matter when the assignment to the assignee is actually executed. It does not mean that the property which is the property of the bankrupt at the time the assignment is executed, and also the property which was his property at the time of the commencement of the proceedings, shall pass to the assignee. The whole clause must be read together, and, so read, the words "all the estate, real and personal, of the bankrupt," do not mean all that which is his estate at the time the assignment is executed, but they only mean all that which was his estate at the time of the commencement of the proceedings in bankruptcy. So also, Form No. 18, the form of the assignment, construed in connection with the statute, and purporting on its face, as it does, to be made by virtue of the authority conferred by the 14th section of the act, conveys to the assignee only the property which was the property of the bankrupt at the time of the commencement of the proceedings in bankruptcy, and the blanks in it, for a

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date, are to be filled with the date of the day of the commencement of such proceedings. The word "is" in that form before the word "possessed," is probably a misprint. The form is evidently copied almost *verbatim* from the form of assignment used under the Massachusetts insolvent law, and in that form the word "was" is used, and not "is" before the word "possessed."

This brings up the question, — What is the time of the commencement of proceedings in bankruptcy? The 38th section of the act undertakes to determine this. It provides that "the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, upon which an order may be issued by the court, or by a register in the manner provided in section 4, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act." The order referred to in this provision must be one which can be issued by the court, and which can be also issued by a register, provided power is given to the register by section 4 to issue it, and it evidently must be the earliest order which can be so issued, and it must be an order which is common to voluntary and involuntary cases. It cannot mean the order of reference to a register (Form No. 4); that is confined to voluntary cases, and it can never be made by the register, and there is no corresponding order in involuntary cases. It must mean the order adjudicating the debtor to be a bankrupt. This order in voluntary cases is Form No. 5, and it is called an order in a note to that form. It may be made by the court, and it may also be made by the register under section 4. In involuntary cases this order is Form No. 58, and is called an order on the face of it. It is called in section 42 an "order of adjudication of bankruptcy." It can be made by the court, but it cannot be made by a register, because section 4 of the act as interpreted by General Order No. 5, does not authorize a register to make it. The order of adjudication is the earliest order which answers the requirements of the statute. Besides, the good sense of the

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provision harmonizes with this view. Striking out the words "either by a debtor in his own behalf or by any creditor against a debtor," the provision reads that "the filing of a *petition* for adjudication in bankruptcy, upon which an *order* may be issued by the court or by a register," &c. The words "for adjudication in bankruptcy," are to be understood after the words "order," in like manner as they are found after the word "petition." The petition is filed for an adjudication. The order for an adjudication follows the filing of such a petition.

The next question is as to what is the meaning of the words "*may* be issued." The word *may* must here be interpreted to mean *shall*. The filing of a petition upon which an order of adjudication shall be issued, whether in a voluntary case or an involuntary case, is the commencement of proceedings in bankruptcy. Unless the order of adjudication is made, the filing of the petition is not the commencement of proceedings. In a voluntary case the petition may be filed, and before the adjudication is made, the debtor may, for good reasons, have the proceedings stayed by the court, and they may never be resumed. In such case no title of the debtor to any property can be affected, nor can any creditor acquire any rights under the proceedings, for no proceedings will, in a legal sense, have been commenced. So, in an involuntary case, if under section 41, on the return of the order to show cause, the allegations of the petition are not proved, no order of adjudication is made, and no proceedings have, in a legal sense, been commenced, so as to affect the title to the debtor's property or give any creditors any rights against the debtor as a bankrupt or against his property, except the purely provisional rights and remedies provided by section 40. It requires, therefore, an order of adjudication to make the filing of a petition of any avail as a commencement of proceedings. But when the order of adjudication is made, then the filing of the petition is the commencement of proceedings. By virtue of the making of the order of adjudication, the filing of the petition becomes the commencement of

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proceedings. The making of the order of adjudication relates back and gives an effect to the filing of the petition which it could not previously have, and that effect is that the proceedings are to be considered as having been commenced when the petition was filed.

What is the petition, and what is its filing? By section 11, the petition in a voluntary case is to contain certain averments, and is to have annexed to it a sworn schedule of debts and a sworn inventory of property; and it is declared that if the debtor applies by such a petition with such a schedule and such an inventory annexed, "the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt." In an involuntary case, by section 39, a petition by a creditor is provided * for, and **xxix** by section 40 it is provided that on the filing of the petition an order shall be made for the debtor to show cause why the prayer of the petition should not be granted. No provision is made by the act for the filing of more than one petition by the same debtor or the same creditor in the same matter or for more than one filing of such petition. The 42d section provides that the order of adjudication of bankruptcy in an involuntary case shall require the bankrupt to give to the marshal a schedule of his creditors and an inventory of his estate in the form and verified in the manner required of a petitioning debtor. The 26th section provides that the bankrupt shall "be at liberty, from time to time, upon oath to amend and correct his schedule of creditors and property so that the same shall conform to the facts." General Order No. 7 provides that "the court may allow amendments to be made in the petition and schedules upon the application of the petitioner, upon proper cause shown, at any time prior to the discharge of the bankrupt," and General Order No. 33 provides specially for the mode of making amendments to the schedules annexed to the debtor's petition. All these provisions serve to show that the petition is filed once for all in any case; that if it is amended, such amendment does not alter the date of its filing or post-

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pone the effective vigor of such filing to the time the amendment to it is filed ; that the amending of the schedules does not affect or postpone the time of the filing of the petition ; and that any petition or schedule that is amended is merely amended, leaving the original that is amended still to stand, so far as the question of jurisdiction or commencement of proceedings is concerned, in regard to the time when it was filed, as if it were not amended.

This being so, section 11 declares that the filing of the petition "shall be an act of bankruptcy, and such petitioner *shall* be adjudged a bankrupt." When such a voluntary petitioner, as the 11th section specifies, declares by petition to the proper court his inability to pay his debts in full, and his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain the benefit of the act, and annexes to his petition what purport to be the verified schedule and inventory required by the 11th section, the filing of his petition is an act of bankruptcy, and he has a right to be adjudged a bankrupt immediately on the filing of the petition, even though his petition and schedules may require amendments and may afterwards be allowed to be amended. The adjudication of bankruptcy in a voluntary case ought not to be postponed until, under General Order No. 7, and Rule 4 of this court, the register has examined the petition and schedules and certified them to be correct in form. In the present case, that practice seems to have been pursued, for the petition was filed on the 25th of June, and the adjudication of bankruptcy was postponed until the 12th of September, in order to allow the schedules to be made correct in form. No amendment was made to the petition.

The forms for orders of adjudication support this view. Form No. 5 for a voluntary case, states that the register finds that the debtor "has become a bankrupt," and that the register thereby declares and adjudges him a bankrupt accordingly. He does not become a bankrupt *by* the adjudication, but he becomes one by the filing of the petition, provided that adjudication is afterwards made. The adjudi-

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cation is merely a certificate or order made by an authorized officer to the effect that the petitioner became a bankrupt by the filing of his petition. Hence, in the title of the matter in Form No. 5, the date of the filing of the petition is set forth, and the adjudication is in effect a finding or order by the register that the petitioner became a bankrupt when his petition was filed, and that he is declared and adjudged to be such bankrupt. So, in an involuntary case, the adjudication (Form No. 58) adjudges that the debtor became bankrupt before the filing of the petition, and therefore declares and adjudges him a bankrupt accordingly. In a voluntary case he becomes a bankrupt when he files his petition. In an involuntary case he becomes a bankrupt before the petition is filed against him. In the former case the filing of the petition is the act of bankruptcy. In the latter case some act committed before the filing of the creditor's petition was the act of bankruptcy. But in both cases the adjudication is nothing but a judicial finding of the fact that the act of bankruptcy was committed at some period prior to the time the adjudication is made. When this finding is made, then it is legally adjudged, in the voluntary case, that the proceedings were commenced when the debtor's petition was filed, which filing was itself the act of bankruptcy, and, in the involuntary case, that the proceedings were commenced when the creditor's petition was filed, and not before, although the act of bankruptcy was committed before the filing of such petition.

There is nothing in General Order No. 7 or in Rule 4 of this court, that requires the register to certify the correctness of the petition and schedules before he makes adjudication of bankruptcy. Rule 4 of this court, only requires the register to certify to such correctness before he issues a warrant to the marshal.

The construction I have given to the act, makes all its provisions harmonious. The expression "adjudication of bankruptcy" where it occurs in section 14, means a judicial finding that the party became a bankrupt either by the filing

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of a debtor's petition, or *before* the filing of a creditor's petition. Thus the provision in section 14, that all the property, rights, etc., of the bankrupt, "shall, in virtue of the adjudication of bankruptcy and the appointment of the assignee, be at once vested in such assignee," means that such property, rights, etc., shall, in virtue of the finding that the bankrupt had previously become a bankrupt and the appointment of the assignee, be at once vested in the assignee, but they vest as of the time of the filing of the petition. The expression "time of the adjudication of bankruptcy," in sections 14 and 19, means the time when, by the adjudication, the proceedings in bankruptcy were commenced, according to section 38. Thus, under section 14, the assignee is to be substituted for the bankrupt in suits "pending at the time of the adjudication of bankruptcy," that is, pending at the time the proceedings were commenced, according to section 38. Section 16 provides "that if at the time of the commencement of the proceedings in bankruptcy," an action is pending by the debtor for anything which ought to pass to the assignee, the latter may be admitted to prosecute it in his own name. Section 19 in saying that "all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day," "may be proved against the estate of the bankrupt," means that all debts due and payable at the time of the commencement of the proceedings, as above defined, may be proved. The same section afterwards provides, that any person liable as bail, &c., for the bankrupt, who shall have paid the debt, shall be entitled to prove such debt, "although such payment shall have been made after the proceedings in bankruptcy were commenced." This implies clearly that but for this provision, inasmuch as the payments were not made till after the proceedings were commenced, the claim, not being a debt when the proceedings were commenced, could not be proved, and shows that under the previous part of the section a debt to be provable must be due or must exist as a debt, and not as a mere suretyship, at the time the

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proceedings are commenced ; for if the payments were made after the commencement of the proceedings and before the making of the adjudication, they could, under the previous part of the section be proved as a debt, if that previous part meant that debts which came into existence as such, as late as the making of the adjudication could be proved.

We then come to the discharge. Section 32 gives the form of the discharge *in hæc verba*. It discharges the bankrupt from all provable debts which existed on the day (naming it) on which the petition for adjudication was filed by or against him, excepting such debts, if any, as are excepted by the act from the operation of a discharge. The language of the discharge is too plain for comment. There is but one petition in judgment of law, in a given case, and but one filing of it.

This makes a harmonious system. When an adjudication of bankruptcy is made, following the filing of a petition, then it is judicially established that the proceedings in the case commenced when the petition was filed. The date of such filing then becomes the date from which the assignee takes all the property of the bankrupt which was his property at that date, but the assignee does not take anything which became the property of the bankrupt after that date. Such date also becomes the date at which a debt must be due or exist in order to be provable, subject to the special provisions of section 19, in regard to contingent liabilities. Such date also becomes the date at which provable debts must have existed in order to be discharged by the discharge. In other words, the date of the filing of the petition by or against a debtor, is the date at which, if an adjudication of bankruptcy follows, the old order of things passes away and a new leaf is turned over. Any other construction would work injustice either to the bankrupt or to his creditors. As he can be discharged only from debts which existed on the day the petition was filed, it would be wrong to give to the creditors, holding those debts, property acquired by him after that day, and thus take it away from the * bankrupt xxx

In re Samuel W. Levy & Mark Levy.

or from creditors whose debts, because not in existence on that day, cannot be proved against him under his bankruptcy.

It follows, therefore, that in the present case nothing passed to the assignee which became the property of the bankrupt after the 25th of June, and that the questions in regard to the \$5,000 were improper, if that money was not the property of the bankrupt when his petition was filed.

The clerk will certify this decision to the register, James F. Dwight, Esq.

E. H. Benedict for creditor; *B. Sanford* for bankrupt.

October 30, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

Bankrupt being under examination was asked by creditors and assignee:

"Have you acquired any property since you filed your petition, or since you were declared a bankrupt?" Bankrupt objected. Register sustained objection and excluded the question, whereupon creditors and assignee excepted to his decision and requested that the question so arising be certified to the court for decision. At the conclusion of the examination, counsel for bankrupt proposed to cross-examine, to which creditors and assignee objected that he had no such right.

Heid, That a bankrupt is subject to examination and cross-examination like any other witness, and the question thereof was properly certified for decision as a question of law under section 4.

The question put to the witness was not a proper question, but the register had no power to decide thereon and was therefore wrong in excluding it.

A question put and answered, raises no question or issue of law which can be adjourned into court under section 4, for decision by the judge.

In re SAMUEL W. LEVY & MARK LEVY.

IN this case, on the examination of one of the bankrupts, the creditors and the assignee put the following question to him: "Have you acquired any property since you filed your petition, or since you were declared a bankrupt?" This question was objected to by the bankrupts, and the register sustained the objection, and excluded the question. Thereupon the creditor and assignee excepted to the decision, and desired that it should be certified to the

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court for decision. The register has stated his reasons for excluding the question to be that he is of opinion that under the bankruptcy act, the assignee takes all the property acquired by a voluntary bankrupt up to the day on which the register signs the order (Form No. 5) adjudging him to be a bankrupt.

When the creditors and the assignee had concluded the examination of the bankrupt, the counsel for the bankrupt proposed to cross-examine the bankrupt and asked for an adjournment. The creditors and the assignee objected to such cross-examination, on the ground that the counsel for the bankrupt has no right to cross-examine him, that the right of the bankrupt is limited to explaining by affidavit under General Order No. 33, any answers given by him; that his attention may be called by his counsel to any answer given by him, and he may be asked if he has any explanation to make; that his petition and schedules are his direct examination, and his examination by creditors is a cross-examination; and that he is his own witness and not a witness called by the creditors. The reply on the part of the bankrupt to these views was, that the most proper and convenient mode of calling the bankrupt's attention to any erroneous statement he may have made during his examination, is by questions put by his counsel in the way of cross-examination; that in this way he is afforded an opportunity of correcting or explaining statements made by him; that under General Order No. 33, he may correct his statements under oath, but is not confined to doing so in the form of an affidavit; that the particular way of doing so is in the discretion of the court; and that the examination of the bankrupt by creditors is not a cross-examination, especially as to any new matter inquired of not contained in the petitions and schedules, and particularly as regards his co-petitioner, the defeating of whose discharge, as well as that of the bankrupt examined, was alleged to be aimed at by questions propounded on the examination.

BLATCHFORD, J. I shall consider the last question first.

In re Samuel W. Levy & Mark Levy.

Under section 26 of the act and General Order No. 10, I think that the bankrupt is to be examined and cross-examined like any other witness. Section 26, after providing that the bankrupt may be required to attend and submit to an examination on oath, says, that "the court may in like manner require the attendance of any *other* person *as a witness*," and that "for good cause shown, the wife of any bankrupt may be required to attend before the court, to the end that she may be examined *as a witness*." Form No. 45 is prescribed as a form to be used indifferently as an order for the examination either of the bankrupt or of his wife. Form No. 46 is prescribed as a form to be used as a caption to the examination of the bankrupt or of any witness. Form No. 47 is prescribed as a form of oath to be taken on such examination by the bankrupt or his wife. General Order No. 10 provides for the manner of conducting the examination of witnesses before a register, and says that "the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode adopted in courts of law." It then prescribes that the depositions shall be taken in narrative form, except in special cases, and shall be read over to the witness and signed in presence of the register. It then provides that "any question or questions which shall be objected to shall be noted by the register upon the deposition, but he shall not have the power to decide on the competency, materiality, or relevancy of the question, and the court shall have the power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them that may be just." Now if General Order No. 10 does not apply to the examination of the bankrupt, then there is no general order that does apply to his examination, and it is left to be regulated merely by the statute. If the bankrupt is to be regarded as a witness, then General Order No. 10 does apply to him, and expressly provides that he shall be subject to examination and cross-examination. That general order speaks of the testimony given on the examination of witnesses as "depositions." Section 47 of the act in its list of fees to registers says, "For taking depositions, the

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fees now allowed by law." The only fees allowed by law for taking depositions are those prescribed by the act of February 26, 1853 (10 U. S. Stat. at Large, 167) as fees to commissioners for taking and certifying the depositions of witnesses. So that unless the bankrupt is to be regarded as a witness, and unless his deposition is the deposition of a witness, no fee is given for taking his deposition. Everything in the act and in the general order tends to the conclusion that Congress and the framers of the general orders intended that, at least so far as the manner of examining the bankrupt and taking his deposition is concerned, the proceeding should be conducted like the examination of any other witness, and the bankrupt be examined by direct and cross-examination. Whether so far as the effect of his testimony is concerned, the bankrupt is to be considered as a witness called by the creditor or the assignee, or as a witness for himself under cross-examination by the creditor or the assignee, or not at all as a witness, but as a bankrupt under examination under the special authority of section 26 of the act, is another and a different question, and one which will be disposed of when it is properly raised.

There is nothing in General Order No. 33 that conflicts with this view. When the examination and cross-examination of the bankrupt before the register are completed, and the deposition is signed by him and filed as required by section 26, the whole document is "his examination;" and General Order No. 33, in saying that "in like manner he may correct any statement made during the course of his examination," means that he shall have, in regard to statements made by him during the course of his examination, the same opportunity of correcting those statements that he has of supplying omissions in the schedules to his petition. This latter right is expressly given to him by section 26, which says that he shall "be at liberty from time to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts." The facts and the truth are what the law aims at, and the bank-

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rupt is not to suffer because he has made an honest mistake in his schedules. Therefore General Order No. 7 provides that "the court may allow amendments to be made in the petition and schedules upon the application of the petitioner, upon proper cause shown, at any time prior to the discharge of the bankrupt;" and General Order No. 33 provides that, "in making any application for amendment to the schedules, the debtor shall state, under oath, the substance of the matters proposed to be included in the amendment, and the reasons why the same had not been incorporated in his schedule as originally filed, or as previously amended." So also by General Order No. 33, with a view to the ascertainment of the truth, and in order that the bankrupt may relieve himself from the imputation of having wilfully sworn falsely in his examination in relation to any material fact, which charge is made a ground by section 29, for withholding his discharge, he is permitted, on stating under oath the substance of the correction he desires to make, and the reason why it was not stated during his examination, to correct any statement made during the course of his examination on making a proper application to the court for leave to make such correction. That is the meaning of the words "in like manner," in General Order No. 33, and that, and nothing else, is the purport and scope of that order, so far as it relates to the bankrupt's examination. The question thus decided was properly certified as an issue of law under section 4 of the act.

xxxix The other question certified is not a question * of fact or of law which can be certified under section 4.

The question certified is, whether the question put to the bankrupt, "Have you acquired any property since you filed your petition, or since you were declared a bankrupt?" was a proper question. The question certified is certainly not an issue of fact, and there are several reasons why it is not an issue of law.

1. The certificate of the register merely states that the question was objected to by the bankrupt, and that the reg-

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ister sustained the objection and excluded the question. This is not raising an issue of law within section 4. The ground of objection to every question objected to, should be stated, otherwise no point or question or issue in regard to it is presented or raised.

2. By General Order No. 10, the register had no right to decide on the competency, materiality, or relevancy of the question. He is required by that order to note the objection upon the deposition, that is, not merely the fact of objection, but the ground of objection, and if no ground of objection is assigned, he is not bound to note the fact of objection, and the ground of objection must be directed to the competency, materiality, or relevancy of the question. But he is not allowed to make any decision thereon. Therefore no issue of law can be raised on his decision, nor can the propriety of such decision be certified as an issue of law under section 4. The question, therefore, whether the register was right in sustaining the objection to the question asked, and in excluding it is not properly certified as an issue of law under section 4.

3. Under General Order No. 10, a question put to a bankrupt or other witness on an examination before a register, and objected to in proper form, does not raise a question or issue of law which can be adjourned into court under section 4 for decision by the judge. The manifest intention of that order is, that when a question is objected to, the question and the fact and grounds of objection shall be taken down by the register, and that the question, although incompetent, immaterial, or irrelevant, shall be answered, and that when the deposition is closed the court shall deal with it as a whole, and then pass upon the question as to what parts of it are incompetent, immaterial, or irrelevant, and impose costs in its discretion upon the party who caused the taking of the parts which ought not to have been taken. The language of the order is: "Any question or questions which may be objected to, shall be noted by the register upon the deposition, but he shall not have power to decide on the competency, materi

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ality, or relevancy of the question, and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions as may be just." Now, inasmuch as by section 4 it is made the duty of the register to adjourn into court for decision by the judge, any question or issue of fact or of law that is raised and contested by any party in the course of the proceedings, if the making of an objection to a question put to a witness in the course of his examination, raises an issue of law which the register is obliged to adjourn into court under section 4, so that it may be decided by the judge, there will be left on the record of the examination no questions objected to and undisposed of, and no objections noted and undecided by the court, and there can be no incompetent, immaterial, or irrelevant depositions or parts of depositions to be dealt with in regard to costs; every objection will be adjourned into court as an issue of law, and disposed of as it arises, and no incompetent, immaterial, or irrelevant answer or testimony will be found in the record, for the court will already either have excluded all answer to the question objected to by deciding the question to be incompetent, immaterial, or irrelevant, or else admitted the testimony as competent, material, and relevant. For the good sense of General Order No 10 is, that it extends not only to objections to questions, but also to objections to answers and testimony on the ground of competency, materiality, and relevancy, and that neither question nor answer nor testimony is to be ultimately held to be incompetent, immaterial, or irrelevant, unless objected to on the record for some ground of incompetency, immateriality, or irrelevancy stated on the record. The practice thus prescribed for taking depositions, where the officer taking them notes the objections made to questions and answers, but has no power to decide on the competency, materiality, or relevancy of any question or answer, is the established practice in examination before an examiner in chancery, and in some other examinations, and no practical difficulty or embarrassment is experienced in the working of such a system. Although the meaning of the provision of section 4 of the act

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that the register shall *adjourn* the question or issue into court for decision by the judge, is not that he shall necessarily adjourn the further proceedings in the matter until question or issue raised and contested shall be decided by the judge (General Order No. 11 providing that the pendency of an issue undecided, before a judge, shall not necessarily suspend or delay other proceedings before the register in the case, and the word *adjourn* in the section having the signification merely of the word *certify* or *transmit*), yet I am satisfied that to hold that every objection to a question put, on an examination of the bankrupt, or of any other witness before a register, raises a question or issue of law, which, under section 4 of the act, *must* be certified to the court for decision as it arises, would soon break down, not only the system, but the court. For although the pendency of the issue undecided before the judge would not, under General Order No. 11, necessarily suspend or delay other proceedings before the register in the case, and although the examination of the bankrupt or other witness might proceed in respect to questions or answers not objected to, yet it could hardly be pretended that under such a system it would be proper to close the examination until the decision of the court has been had upon the question and issues thus raised. This would open the door to a protraction of the examination and of the case, until human patience would be wearied out, and the bankruptcy system would be valueless alike to creditor and debtor, to say nothing of the increased expense caused to both. In regard to the hardship urged, of obliging the bankrupt or other witness to disclose under irrelevant, immaterial, incompetent, inquisitorial, and other questions, the offspring of a mere itching and prurient curiosity, things which he ought to be protected from being compelled to answer, the same hardship exists in regard to the examinations before an examiner in chancery, and the other kindred examinations before referred to. And the bankrupt or other witness always has it in his power, in a clear case of abuse, to refuse, under the advice and responsibility of his counsel, to answer

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a question. Then, on an application to punish the party for a contempt, which must come before the court, and which the register has, under section 4 of the act, no power to entertain, the whole question as to the competency, relevancy, and materiality of the question will come before the court in a proper way for adjudication. Responsible counsel will not advise a party to refuse to answer a question except in a clear case of abuse, and a party will not be likely to run the hazard of a contempt of court in refusing to answer a question unless advised by counsel to refuse. In this way, real and substantial questions alone will come before the court for adjudication, whereas, under the facility with which an objection can be made to a question or answer, and the irresponsibility for making it, except as regards the mere penalty of costs, the court would probably find itself able to do little other business than to dispose of objections to single questions and answers, one at a time, certified by registers, on examinations before them.

For these reasons, I am satisfied that a question put to a bankrupt or other witness, on an examination before a register, or an answer given by him, even though objected to in proper form, does not raise a question or issue of law which can be adjourned into court, under section 4 of the act, for decision by the judge.

Inasmuch as the first question certified in this case by the register is not properly adjournable into court for decision by the judge, under section 4, it remains to be considered whether it is properly before the court under section 6 of the act.

Section 6 provides for two modes of bringing a question before the court. The first mode provided is, that "any party shall, during the proceedings before the register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approves thereof, and such cer-

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tificate so signed shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge, at chambers or in open court." This provision is very difficult of satisfactory interpretation, and of practical execution. It is not stated what the judge shall do if he does not approve "thereof," and it is only the certificate to be signed by the judge, if he does approve "thereof," which is made binding on all parties to the proceeding. The opinion of the judge, so to be taken, is not declared to be binding on the parties, unless the judge approves of and signs the certificate.

* In the present case, in regard to the first question xxxii so certified, I am of opinion that the question put to the witness, and excluded by the register, was not a proper question to be put, but I am also of opinion that the register had no power to decide on the competency, materiality, or relevancy of the question, and was, therefore, wrong in excluding it; and I am also of opinion that the view of the register, that under the bankruptcy act, the assignee takes all the property acquired by a voluntary bankrupt up to the day on which the register signs the order (Form No. 5), declaring and adjudging him to be a bankrupt, is not a correct view; and I am also of opinion that the reasons given by the register, in his certificate for holding that the objection to the question put was a good objection, are not sound. I, therefore, cannot say that I approve the certificate, within the language of section 6. My opinion upon the point or matter on which my opinion is desired by the certificate, has been given, but of what avail it is, or how far it is binding on the parties, under section 6 of the act, is something I am not now called on to decide.

Judge Hall, of the northern district of New York, has made a rule of his court (Rule 24), in regard to this certificate under section 6, as follows: "In every certificate made by a register, stating any case, point, or matter for the opinion of the district judge, under the 4th or 6th section of the bankrupt act, according to Form No. 50, established by the Gen-

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eral Orders in Bankruptcy, the facts agreed upon by the parties to the controversy shall be clearly and fully stated, with reasonable certainty of time and place; and this shall be followed by a brief statement of the claim made, or position assumed by each of the parties to the controversy. The register shall then add thereto such proposed order, adjudication or decision as in his judgment ought to be made, and which shall be in such form that the district judge may signify his approval thereof by his signature. The register shall then afford to each of the opposing parties, or their attorneys, a reasonable opportunity to consent, in writing, to the register's decision thereon. The court will, on the approval and confirmation of such decision of the register, make such order for costs, against "any party declining to assent thereto, as may be deemed proper. In case all parties to such controversy shall assent to such adjudication or decision of the register, he shall file the same, and proceed with the case upon the basis thereof, as though such controversy had not arisen." This rule seems to imply that Judge Hall regards the opinion of the district judge, in respect to any case, point or matter stated in the certificate of a register, under either the 4th or 6th section of the act, is to be given solely by his approving or disapproving the proposed order, adjudication or decision, which is to be added by the register to the certificate, his approval being signified by his signing the proposed order, adjudication or decision, and his disapproval being signified by his withholding his signature.

The second form, under section 6, in which the opinion of the court can be obtained upon a question arising in the course of the proceedings, is, by a special case, stated by the parties by consent and signed by them or their attorneys, and when it presents an issue raised before the register in any proceedings, certified by the register, under General Order No. 11. The present certificate is not one of such a special case.

The question intended to be raised by the certificate, in this case, and which is discussed by the register, as to the

In re Charles G. Patterson.

time when the line is to be drawn between property which does and property which does not pass to the assignee in bankruptcy, is one of paramount importance, and is fully considered and disposed of by me in my decision in the *Matter of Charles G. Patterson*, made herewith. (*Ante*, p. xxviii.)

The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

October 30, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where questions were put to bankrupt on his examination touching the acquirement of certain moneys, to which bankrupt objected, and the register overruled his objection :

Held, That the register had no power to decide on the validity of objections or on the admissibility of the questions.

*In re CHARLES G. PATTERSON.*¹

THE register certifies as follows :

Facts. An order had been made for the examination of the bankrupt under oath, and he had attended before Mr. Register Ketchum, acting in the absence of, and at the request of Mr. Register Dwight, on the 15th, 16th, and 19th of October, and had been examined under oath.

On the 19th of October the 48th interrogatory was (referring to a certain sum of money of \$5,000 which the bankrupt had previously answered concerning) —

48th Interrogatory. “Where is it?”

Objected to by Mr. Sanford; allowed by the register, and Mr. Sanford excepted.

Answer. “It has been mostly spent, used.”

49th Interrogatory. “How much of it was spent?”

Objected to as before, and because it is an inquiry about property which the bankrupt has acquired since the com-

¹ Cited in *Judson's case*, 1 N. B. R. 83, *quarto*; and *Collins's case*, 1 N. B. R. 154, *quarto*.

In re Charles G. Patterson.

mencement of these proceedings. Pending decision by the register, by agreement the hearing was adjourned to October 24th, at 10 o'clock.

On the 24th, as by adjournment, appeared Mr. Sanford, attorney for the bankrupt, and Mr. Robert Benedict, attorney for the creditors, Tupper & Beattie; and Mr. Sanford, for the bankrupt, who does not appear, presents and files the following written objection to interrogatories proposed on the 19th "*nunc pro tunc*:" —

"In the Matter of Charles G. Patterson, a Bankrupt.

"Upon examination of bankrupt before Mr. Register Dwight, upon motion made under 26th section of the act.

"To the 48th and 49th questions proposed to the bankrupt, he objects, through B. Sanford, one of his attorneys, for that in matter of law the examining creditors had no right to inquire of the bankrupt as to any property in his possession and acquired after the commencement of the proceedings in bankruptcy under which the examination is had, or if they have any right, the same has been exhausted under the preceding interrogatories answered by the bankrupt.

"B. SANFORD, Attorney for Bankrupt."

—and requested the register to adjourn the question into court as an issue of law to be decided by the judge under section 4 of the act. And the register declined to adjourn the question into court, inasmuch as the court has directed in the case of Levy, bankrupt, that the examination of bankrupts shall proceed without delay till the same be finished.

And the register overrules the objection raised, without argument, and allows the questions.

And Mr. Benedict requests the register to certify to the judge for his opinion, under the 6th section of the act, the following question:—

"I request the register to certify to the judge the question whether the objection raised by the counsel for the bankrupt

In re Charles G. Patterson.

to 48th and 49th questions are valid, or whether the register was correct in admitting those questions.

“ R. L. BENEDICT,
“ *Of Counsel for Creditors.*

“ *October, 24, 1867.*”

— which request is hereby granted, and the above facts and questions are submitted to the decision of his honor the judge.

In my opinion the creditor has the right to ask, and the bankrupt must answer the 48th and 49th questions, for the 26th section of the act, by its general terms, clearly means, I think, to allow the fullest examination of the bankrupt.

And furthermore, it is my opinion that the direction of the court in the case of *Levy*, covers all such examinations as this; and that objections to questions do not raise such points or issues of law as to entitle the register to adjourn the case into court under the 4th section.

If any objection raised to a question should be considered an issue of law, justifying an adjournment under the 4th section, examinations might be prolonged interminably and the real object of the same defeated.

JAMES F. DWIGHT, *Register, &c.*

BLATCHFORD, J. It is impossible in the foregoing statement to determine whether the objections raised by the counsel for the bankrupt to the 48th and 49th questions are valid, or whether the register was correct in admitting those questions, for the reason that it does not appear whether the \$5,000 inquired about was in fact property acquired by the bankrupt after the commencement of the proceedings. The register, however, would not in any event have power to decide on the validity of the objections or on the admissibility of the questions. (See decisions of this date in the *Case of Samuel W. Levy & Mark Levy*, and in the *Case of Charles G. Patterson.*)

The clerk will certify this decision to the register, James F. Dwight, Esq.

October 30, 1867.

In re Charles G. Patterson.

xxxiii. * U. S. DISTRICT COURT, S. D. NEW YORK.

A bankrupt under examination may consult with his counsel in the discretion of the register.

In re CHARLES G. PATTERSON.

THE register certifies the following question :

Facts. The bankrupt being under examination by virtue of an order duly issued, and being present with his counsel, Mr. B. Sanford, before the register, comes now and files the following question :

“ In the Matter of C. G. Patterson, a Bankrupt.”

“ Before Mr. Register Dwight, before whom said matter is pending, and upon examination had under an order for examination under the 26th section of the law.

“ And now comes the above named bankrupt, and being under an examination under an order duly issued and served therefor, and said examination being had by written interrogatories and answers taken down by the register sitting in the case, and respectfully requests that he may be permitted to consult his counsel, Mr. B. Sanford, in relation to his answers to such interrogatories as may be proposed to him, before answering the same, and to avail of the assistance of his said counsel in drawing his answers to such questions or interrogatories as may be proposed to him in the course of his said examination.

“ C. G. PATTERSON,

“ By his Attorney, B. Sanford.”

And the register allows the request, to which Mr. Benedict, on behalf of Tupper & Beattie, objects, and requests that the question may be certified to the judge for his decision thereon.

In my opinion the bankrupt should have the privilege of consulting with his counsel, while under examination, provided that such consultation does not cause delay in the pro-

In re Charles H. McIntire.

ceedings ; which above facts and questions raised are respectfully submitted to his honor the judge, for his decision.

JAMES F. DWIGHT, *Register*.

BLATCHFORD, J. Within the limit above stated by the register, that is to the extent of allowing to the bankrupt the privilege of consulting with his counsel while under examination, provided that such consultation does not cause delay in the proceedings, the register is the proper judge of the propriety of allowing to the bankrupt such privilege, and the court will not interfere with the exercise of such discretion in ordinary cases.

The clerk will certify this decision to the register, James F. Dwight, Esq.

October 31, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where a discharge is applied for after sixty days from adjudication of bankruptcy, the notice (Form 52) need be mailed only to creditors who have proved their debts. In such case the request of the assignee (Form No. 23) is not necessary.

In re CHARLES H. MCINTIRE.

IN this case the register certifies that in the course of the proceedings the following questions arose pertinent to the said proceedings, to wit :

1. Whether, when the discharge is applied for after sixty days from the adjudication of bankruptcy, the notice (Form No. 52) as containing the notice of the second and third general meetings of the creditors, must be mailed to all the creditors known to the bankrupt, or only to those creditors who have proved their debts.

2. Whether in applying for the order to show cause why a discharge should not be granted after sixty days from the adjudication of bankruptcy, the bankrupt must furnish to the register the request (Form No. 28) in order that the second meeting may be called in the order to show cause.

In re Charles G. Patterson.

It seems to me (1.) That it is safer to require the notice to be given to all the creditors ; and (2.) That the request of the assignee (Form No. 28) ought to be filed with the register.

All which I very respectfully submit to his honor, Judge Blatchford. EDGAR KETCHUM, *Register*.

BLATCHFORD, J. The notice need be mailed only to those creditors who have proved their debts, and it is not necessary that the request of the assignee (Form No. 28) should be furnished.

The clerk will certify this decision to the register, Edgar Ketchum, Esq.

November 1, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where a bankrupt under examination was asked whether he had lost property at gaming, objected to the question. The register overruled his objections but the bankrupt refused to answer.

Held, The question was broad enough to cover time subsequent to commencement of proceedings in bankruptcy, and was therefore improper.

In re CHARLES G. PATTERSON. .

IN this case the register certifies the following question :

Facts. Under an order of examination had in the case, the bankrupt was present before the register on the 30th day of October, and was being examined by Mr. Robert D. Benedict, attorney for Tupper & Beattie, creditors.

The following questions were asked and answered as follows by the bankrupt :

Question 126. How much property had you a year ago ?

Answer. I probably had what cost me \$100,000, in real and personal property, subject, perhaps, to liens of various kinds, to half that amount.

Question 127. Have you lost any part of that in gaming ?

Objected to by the bankrupt as incompetent and irrelevant.

In re Charles G. Patterson.

The register overruled the objection and allowed the question, and thereupon the bankrupt, under instruction of counsel, refuses to answer until ordered so to do by the court; and the question and matter is referred to his honor the judge, under the provisions of section 7 of the bankrupt act.

The register further certifies that proceedings in this matter were commenced on the 25th of June, 1867, and that adjudication of bankruptcy was made after the schedules were amended by the petitioner on the 12th day of September following.

Opinion of the Register.

I think that the bankrupt is compellable to answer the question which he has refused, No. 127. The law in section 26, gives to creditors the fullest rights in the examination of bankrupts, using the words "upon all matters relating to the disposal or condition of his property," and "to all other matters concerning his property and estate and the due settlement thereof according to law."

Section 29 says that "no discharge shall be granted, or if granted shall be valid, if the bankrupt has made any fraudulent gift of any part of his property, *or has lost any part thereof in gaming.*"

Section 44, in addition, provides for the punishment of the bankrupt, who *after* the commencement of proceedings shall *spend any part of his property in gaming.*

It seems to me that these creditors have a double interest in this question, and a double right.

Firstly. The interest and right to know if any of the bankrupt's property, which otherwise might go towards the liquidation of their claims, has been wasted or squandered by him, perhaps in some manner which would give the assignee the right to recover it back, thereby swelling the assets; and

Secondly. Of opposing the discharge of the bankrupt, and of punishing him if he has rendered himself liable under the 44th section. I do not see how the "due settlement according to law" of the facts concerning it are made patent.

In re David Ruth.

Which statement of facts and opinions are respectfully certified and submitted to his honor the judge, for his decision and action.

JAMES F. DWIGHT, *Register.*

BLATCHFORD, J. The question, so far as it called on the bankrupt to answer as to whether he had, since the commencement of proceedings in bankruptcy, lost in gaming any property belonging to his estate, was objectionable, as calling on him for an answer which might subject him to punishment for a criminal offence, under section 44 of the act. The question was broad enough to cover the time subsequent to the commencement of the proceedings in bankruptcy, and was therefore improper.

The clerk will certify this decision to the register, James F. Dwight.

November 2, 1867.

DISTRICT COURT, E. D. PENNSLVANIA.

Under the present bankrupt law of the United states, and the state exemption laws incorporated with it by its provisions, the exemption of such property, real or personal, of the appraised value of \$300, as a bankrupt in Pennsylvania may elect to retain as exempt under the laws of the state, is not included in, but is additional to, the exemption from the operation of the bankrupt law of such necessary and suitable articles, not exceeding in value \$500, as with due reference, in their amount, to the bankrupt's family condition and circumstances, may be designated and set apart by the assignee, subject to the court's revision.

But this exception, to the full value of \$500, ought not to be allowed in all cases, without discrimination, or measure.

In re DAVID RUTH.

THE 14th section of the bankrupt law of March 2d, 1867 (14 Ll. U. S. 522, 523), excepts from the operation of the assignment of a bankrupt's estate, his necessary household and kitchen furniture, and such of his other articles and necessities, not exceeding in value, in any case, \$500, as shall be designated and set apart by the assignee, having reference in the amount, to the bankrupt's family condition and cir-

In re David Ruth.

cumstances ; also his wearing apparel, and that of his wife and children, and his uniform, arms, and equipments, * if he is, or has been a soldier in the militia, or in the xxxiv service of the United States, and such *other* property as is, or shall be, exempt from attachment or execution by the laws of the United States, and such *other* property *not included in the foregoing exceptions*, as is exempted by the laws of the state in which he is domiciled, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864. And it is enacted that the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the court.

The act of congress of May 19, 1828, section 3 (4 Ll. U. S. 281), had provided that the proceedings upon executions in the courts of the United States should be the same as were then used in the courts of each state ; and had empowered the courts of the United States, by rules of practice, to make such proceedings conformable to any changes thereafter adopted by the legislation of the respective states. Through this act, and subsequent rules of practice adopted as authorized by it, the practice in the federal and state courts, in 1864, was, in general, the same as to the exemption of the property of debtors. The laws of some of the states exempted personal property to an amount exceeding in value \$500 ; and the laws of several states exempted real property to various greater amounts, extending in certain states even to the value of \$5,000, if not beyond it. By the laws of other states, exemption was limited to subjects of the value in the whole, of less than \$500. The laws of Pennsylvania exempted all wearing apparel of the debtor and his family, and all bibles and school-books in use in the family, and as to the debts contracted since 4th of July, 1849, exempted such other property, real or personal, as he might elect to retain, to the value of \$300, to be ascertained upon his request, by the valuation of sworn appraisers summoned by the officer levying the execution. The debtor was allowed to elect to retain to this amount, out of any bank

In re David Ruth.

notes, money, stocks, judgments, or other indebtedness to him.

According to one of the forms which the judges of the supreme court of the United States have prescribed, under the authority conferred upon them by the 10th section of the bankrupt law, a debtor petitioning for adjudication and relief in bankruptcy must set forth under a distinct head of one of the schedules annexed to his petition, a particular statement of the property claimed as excepted by the provisions of the 14th section of the act from the operation of his future assignment; giving each item and its valuation, and, if any portion is real estate, giving its location, description, and present use. The statement is to be thus made in two divisions, one of them containing the property claimed to be excepted, which may be set apart by the assignee under the 14th section of the act, and the other containing the property claimed to be exempted by state laws. One of the general orders (General Order XIX.) of the supreme court requires the assignee, immediately upon entering upon his duties, to prepare a complete inventory of all the property that comes into his possession, and to make report to the court, within twenty days after receiving the deed of assignment of the articles set off to the bankrupt by him, according to the provisions of the 14th section of the act, with the estimated value of each article; and allows to creditors twenty days from the filing of such report for taking exceptions to the determination of the assignee. There is a form appended (Form No. 20) of the schedule of property thus designated and set apart by the assignees to be retained by the bankrupt, requiring specification of it under five heads, namely, Necessary household and kitchen furniture; other articles and necessaries; wearing apparel of bankrupt and his family; equipments, if any, as a soldier; other property exempted by the laws of the United States; property exempted by state laws.

In this case, the bankrupt had exhibited, in the proper schedule annexed to his petition, and under the proper head,

In re David Ruth.

a statement, in the two divisions prescribed, of personal property to the value of \$500, claimed by him as excepted, which might be set apart by the assignee, and other personal property to the value of \$291.75, claimed as exempt by the laws of the state. The assignee set apart from the bankrupt's use personal property to the appraised value of \$500, and no more, composed of items included in each of the two divisions of the bankrupt's claim of exceptions and exemption, annexed, as above, to his petition. According to the assignee's inventory, and the estimate of the appraisers, the whole value of the remaining personal estate was \$259.55. The real estate was appraised at \$2,000.

"The bankrupt demands of the assignee that the additional three hundred dollars' worth of property exempted by the laws of Pennsylvania shall be set apart to him." This the register certifies; adding that "the opinion of the court is required for the guidance of the assignee." The bankrupt thus demands, in effect, an exemption to the value, in the whole, of \$800.

It was objected that an exemption to this amount should not be allowed in any case. In support of the objection, it was said, in this case and in another one somewhat similar, that the legislation of the United States having assumed \$500 in value, and the legislation of the state having assumed \$300 in value, to be the greatest proper amount of exemption, a result of the two legislations combined which would extend the exemption to \$800, cannot have been intended, because it would be absurd. It was therefore argued that the exemption of \$500 under the act of congress must be understood as including that of \$300 under the laws of the state, except as to bibles and school-books, which alone were within the proper meaning of the phrase "other property" in the act of congress. Although a debtor might, under the law of the state, elect that real property of the appraised value of \$300 should be exempt, yet, when he did so, he made it, according to this argument, a part of the \$500 in value exempted. At all events it was contended that the twofold or cumulative

In re David Ruth.

exemption could only be allowable in a case in which the subjects of the two divisions were so different that those of the one kind could not be included in those of the other, and consequently, that it should not be allowed in the present case, where the whole exemption was, under both divisions, claimed from personal estate of the same general character.

It was answered that the assumed intention to limit the exemption to \$500 in value was not rightly attributable to congress, and that the contrary became apparent on recurrence to the above mentioned exemption laws of some other states, which the act of congress had, in effect, incorporated with its provisions, these laws admitting exemptions to amounts vastly greater than \$500; and that even if this had been otherwise, the exemption of \$300 under the Pennsylvania laws could not be included in that of \$500 under the act of congress, because the subjects were different. The difference asserted was that the subjects of exemption under the state laws were, except as to their valuation, determined absolutely by the debtor's own arbitrary election, whereas, under the act of congress, the subjects of exemption were determinable by a designation which the assignee was to make, upon relative considerations of suitableness, depending upon the debtor's family and condition in life, and his former circumstances, and that this determination was afterwards judicially revisable. It was contended that the subjects were therefore different, and, according to the relative sense of the words "other property" in the act of congress, were independent of, and consequently additional to, one another. According to this argument, besides wearing apparel, bibles, school-books, uniforms, arms, and equipments, and property to the appraised value of \$300, arbitrarily designated by the bankrupt himself, the assignee is, with due reference to the bankrupt's family condition and circumstances, to designate such additional property as may not, in these respects, be unsuitable, which cannot exceed, but may reach \$500 in value; and thus the whole may amount, in a proper case, to \$800, in addition to the wearing apparel and other specifically designated articles.

In re David Ruth.

As to the special considerations which ought, under the act of congress, to determine the designation by the assignee, or to determine its extension to such a maximum, nothing was said on either side.

CADWALADER, J. If the exemption laws of all the states had resembled those of Pennsylvania, there would have been great apparent force in the argument against allowing the twofold exemption under the state laws and the act of congress to extend in any case, in the whole, beyond the value of \$500. There would, however, have been difficulty in accommodating the argument to the words of the act of congress. Whether this difficulty could have been overcome, it is unnecessary to consider, because, upon recurrence to the exemption laws of other states which are, in effect, incorporated with the act of congress, the argument loses all force, or all applicability. The act of congress must therefore be interpreted with reference to other motives of legislation.

Proceedings in bankruptcy, where it is involuntary, resemble, in many respects, a general execution for the equal benefit of the creditors. Where bankruptcy is voluntary, the resemblance * does not in all respects fail. It xxxv is foreign to the purpose of proceedings under such a bankruptcy, that they should operate upon property otherwise exempt from execution, unless it is thus exempt under defective previous laws, which the bankrupt law is, in this respect, intended to improve. Under the present bankrupt law no such change was intended. On the contrary, the previous uniform system, under state laws of exemption, in the federal and state courts is continued, as it had been established under the act of congress of 1828, and under subsequent rules of the federal courts authorized by this act. In this respect, the bankrupt law merely provides that the state exemption laws, thus previously adopted, shall still apply, so as to exclude their subjects from the operation of the proceedings in bankruptcy. The law further enacts, in effect, that there may, in proper cases, be an additional exemption to be graduated with reference to the number, health, &c., of the bankrupt's

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family, to his condition in life, socially and otherwise, and to his former and recent, if not present, circumstances. Confusion of the views of the present question has arisen from hastily assuming that it is a question of the absolute unmeasured allowance of an additional exemption to the value of \$500. The allowance is conditional, and is measured with reference not merely to value, but also to subjects, and their suitability to personal requirements. The subjects must be necessaries and other articles which, in character, as well as in amount and value, are suitable to his family condition and circumstances. There may be cases, few perhaps in number, in which, though he may own property of a value considerably exceeding \$300, it would sanction a fraud upon his creditors to allow him any part of the excess beyond it, except the specifically designated articles. For example, in a possible case, a debtor who never had owned property to the value of \$300 beyond the amount of his debts, might become a bankrupt for the very purpose of depriving creditors of recourse to assets in excess of this value. Such an attempt should never be successful. In ordinary cases, the property excepted should not, however, be of less value than \$200, in addition to the subjects of the state exemption laws to the value of \$300, and the specifically designated articles. In special cases, the property additionally excepted may be of greater value; and, in some extraordinary cases, may be of the full value of \$500, making the whole value, including \$300 under the state laws, amount to \$800, in addition to that of the wearing apparel and other specifically designated articles.

In the act of congress the articles newly excepted are mentioned first, and those previously exempted by state laws are mentioned lastly. The more natural order of considering the two subjects in Pennsylvania, if not elsewhere, is, perhaps, to invert this arrangement. Thus, the assignee should first consider what exemption is claimed under the laws of the state. As to the subjects of this claim of exemption, his only function is to see to their proper appraise-

In re Charles G. Patterson.

ment. In seeing to it, he should proceed as conformably to the laws of the state as may be possible. These subjects of exemption, and the specifically designated articles, having been set apart, a more responsible duty is afterwards to be performed by him in designating the additional articles excepted under the act of congress.

In the present case, I infer that if the bankrupt is not to obtain a further exemption than has been allowed, neither he nor any other party objects to the selection of the articles which he has received. He was mistaken in demanding the additional amount as of absolute right, independently of consideration relative to his family condition and circumstances. On the other hand, the assignee was also mistaken if he supposed the act of congress to preclude him absolutely, under all circumstances, from allowing an exemption beyond the value of \$500 in the whole. Whether this bankrupt ought to have received more than has been allowed I have no certain means of deciding from what is now before me. This must be determined by the assignee, whose report, if the bankrupt persists in his claim, will be made hereafter through the register.

October 26, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where a question was put to the bankrupt under examination which he refused to answer :

Held, No decision could be given as to the question raised, because the certificate did not disclose what interrogatories preceded the one which witness refused to answer.

In re CHARLES G. PATTERSON.

THE register in this case certified as follows :

Facts. The bankrupt, being duly under examination, was asked this question by Mr. Benedict, counsel for the creditors, Tupper & Beattie.

In re Charles G. Patterson.

Q. 128. Have you since that time, a year ago, and before the commencement of these proceedings in bankruptcy, lost any part of your property in gaming?

Answer. Under advice of my counsel I decline answering the question, for the reason that so far as the question relates to time antecedent to the passage of the act, the question is incompetent, immaterial, and irrelevant, and not within the scope of the examination warranted under the 26th section of the act.

And the register overruled the objection, and directed the question to be answered.

And the bankrupt, under advice of his counsel, declined so to do until so ordered by the judge.

Whereupon Mr. Benedict prayed that the question might be certified to the judge for his decision thereon.

Opinion of the Register.

For the same reason set forth at length in the question certified to his honor the judge, on the 30th of October, I think the question a proper one, and that the bankrupt should be directed to answer it. (*Ante*, p. xxxiii.)

The decision of the judge on the question referred to, was to the effect that the former question covered time subsequent to proceedings commenced by the bankrupt, and was therefore improper. I think that with the limitation of the question as put now, it should be answered as not controlled by that decision.

Which facts and opinion are respectfully submitted to his honor for his decision, with the remark that I think there is much in this case done by the bankrupt (shielding himself behind the advice of his counsel), that it is intended for delay only.

JAMES F. DWIGHT, *Register*.

BLATCHFORD, J. It is impossible for the court to decide as to the question raised, for the reason that the certificate

In re James J. Purvis.

does not show what interrogatories preceded the one which the witness refused to answer.

The clerk will certify this decision to the register, James F. Dwight, Esq.

November 11, 1867.

U. S. DISTRICT COURT, MARYLAND.

An agent of a creditor proved the claim of his principal in bankruptcy, and sought to vote for assignee.

Held, That he could not do so without a power of attorney.

An attorney at law cannot vote for his client without being duly constituted his attorney in fact.

A joint creditor who had proved the joint claim in bankruptcy sought to vote for assignee.

Held, That if the joint creditors were partners, he could vote the full amount of the debt, but if he was joint trustee or joint creditor and no partner, neither could act or vote without consent and authority of the other.

A firm creditor of the bankrupt can be counted only as one creditor in the vote for assignee.

Where creditors of a firm proved claims in bankruptcy against a member who had petitioned individually :

Held, The private creditors only could vote for assignee.

A person to be elected assignee must receive a majority of all who have proved claims, and not simply a majority of votes cast.

In re JAMES J. PURVIS.

GILES, J. In this case the register, at the request of the creditors, has certified the following questions for my decision :

1st. Joshua Jessop has acted as the agent of Elizabeth Jessop, and in that capacity has proved her claim in this case against the bankrupt, and he now desires to cast her vote for assignee, but produces no letter of attorney from her. Can this be done? The register thinks not, and I agree with him in opinion. In section 22 of the bankrupt act, provision is made for proof of a creditor's claim by his attorney or *authorized agent*, where he, the creditor, is absent from the United States, or prevented by some other good cause from testifying; but by the last clause of the 23d sec-

In re James J. Purvis.

tion, the creditor, when absent from a meeting, is only authorized to act by his duly constituted attorney.

2d. Can an attorney at law vote for his client without producing a letter of attorney? This question is answered by my answer to the first question. The party who is entitled to vote for another, must be his duly appointed attorney in fact.

3d. Thomas Hill, a joint creditor with William B. Hill, wishes to vote. Can he do so without the coöperation of the other joint creditor, and for what amount? The register says a joint creditor should be allowed to vote for his proportionate share of the joint debt. I am of a different opinion. If the joint creditors are partners, either party can vote the full amount of the debt; but if they are joint trustees or joint creditors, neither can act or vote without the authority and consent of the other.

4th. William Corse, a member of the firm of xxxvi William Corse & Son, wishes to cast the vote of * his firm. He was allowed to do so, but the following question arose: Should the firm be counted as one creditor, or should each member of the firm be counted as a creditor? The register thinks that each member of the firm should be counted as a creditor. I am of a different opinion. The firm can only be counted as one creditor.

5th. James J. Purvis alone has applied for the benefit of the act. He owes debts individually, and as a member of the firm of Purvis & Co. Purvis' private creditors have proved their claims, amounting to \$21,745.62, and partnership creditors have proved their claims, to the amount of \$64,726.58. Can the partnership creditors participate in this election of an assignee, or will the private creditors alone control the election? The register thinks the private creditors only should be allowed to vote, and I agree with him. The 36th section of the bankrupt act is the only part of the law which provides for the proof of claims and the choice of assignees by the creditors of a firm; and that section provides for the exercise of such a power in the case alone

In re Hugh Campbell.

where two or more partners shall be adjudged bankrupts, either on their own petition or on the petition of any creditor of the partners.

6th. Must a person to be elected assignee receive only a majority of the votes actually cast, or a majority of all who have proved their claims? The register thinks that a majority of all the claims that are proved is requisite, and I agree with him in this opinion. The 18th section of the bankrupt act provides that the choice of assignee shall be made by the greater part in number and in value of the creditors who have proved their debts. If no one receives the vote of this majority, no choice is made by the creditors, and in such case the judge, or if there be no opposing interest, the register, shall appoint the assignee or assignees.

The clerk will certify these answers to the register, Orlando F. Bump, Esq.

U. S. DISTRICT COURT, W. D. PENNSYLVANIA.

Congress, by the Constitution of the United States, had the right to bring all parties, estates, and interests connected with a bankrupt into the district court of the United States as a court of bankruptcy. And to confer upon the district courts the authority to suspend all and every proceeding elsewhere; and to command obedience to their mandates, exclusive of all other jurisdictions. But, by the bankrupt act of the 2d March, 1867, they have not done so. •

This act does not authorize the district courts of the United States to issue injunctions to state courts, nor to the actors or parties litigating before them. The act of 2d March, 1793, prohibited it; and this act is not repealed by the bankrupt law, either in express terms, or by implication.

Courts of a state are independent tribunals, not deriving their authority from the same sovereign, and, as regards the district court of the United States, foreign tribunals every way its equal, and over which the district court has no supervisory power. The bankrupt law does not change the relation of these courts to each other.

The authority conferred by the 40th section, to issue an injunction against the bankrupt, and all other persons, has no reference to the state courts, and it is a limitation of the sweeping provisions of the first section.

It was designed to protect the property of a party not yet declared a bankrupt, until his bankruptcy has been legally established

In re Hugh Campbell.

Liens by the bankrupt law are held sacred, and the creditor is expressly protected by the 14th, 15th, and 20th sections of the act.

The bankrupt's final certificate discharges his person and future acquisitions; but the lien creditor is entitled to satisfaction out of the property subject to lien.

In re HUGH CAMPBELL, *ex parte* CREDITORS.¹

M'CANDLESS, J. I feel the grave responsibility which attaches to the decision which is about to be announced. In construing a new and untried statute, and establishing the practice to be observed in its proper administration, there must necessarily be much diversity of opinion among both lawyers and judges. The interests involved are frequently so large, and the principles so important, that inextricable confusion must result from an unsound interpretation of the legislation of congress. This bankrupt act is, in my judgment, highly beneficial to both the debtor and the creditor. It was designed to relieve the one from oppressive liabilities which render him unfit to contribute to the productive wealth of the country; and it affords to the other an assurance that all the property of the debtor, except what from motives of humanity he is permitted to retain, shall be honestly devoted to the payment of his debts. With a fraudulent debtor it is wisely and justly stringent, compelling a full discovery and surrender of his assets, for the benefit of his creditors, under peril of imprisonment for contempt, which, in the courts of the United States, is a penalty not to be disregarded.

The present is a case upon creditors' petition to declare Hugh Campbell a bankrupt. Numerous acts of bankruptcy have been assigned, all of which are denied, and a trial by jury awarded. Many judgments of large amount, the validity of which is not questioned, have been entered in the court of common pleas of Armstrong County; and they are all prior in date to the period when the bankrupt law went into operation. Upon final process, a sale of real estate by the sheriff has been made, and \$29,290 realized and brought

¹ Cited in *Burns's case*, *post*, xxxviii.

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into court for distribution. Under these circumstances our extraordinary power of injunction was invoked to restrain not only the plaintiffs in these judgments, but the courts of the state and their executive officers, from further proceeding, with design to bring all the property of the bankrupt into this court, as a court of bankruptcy, for division among all his creditors. The injunction against the sheriff and the parties was granted, with leave, *instanter*, for a motion to dissolve, that we might ascertain whether, under the bankrupt law, we have the right to interfere with the courts of the state in the legitimate exercise of their functions.

After much reflection I am satisfied we have not, nor with the actors or parties litigating before them.

The first section of the act is wide in its scope, and would seem to bring all parties, estates, and interests connected with the bankrupt into a common *forum* or centre. And to do so, it is contended that congress, by implication, conferred upon the district court of the United States the authority to suspend all and every proceeding elsewhere, and to command obedience to their mandates, exclusive of all other jurisdictions. This, by virtue of the 5th clause of the 8th section of the 1st article of the Constitution of the United States, granting the power "to establish uniform laws on the subject of bankruptcies throughout the United States," congress had the right to do, but they have not done so.

Staring them in the face was the act of the 2d of March 1793, section 5th, expressly declaring "nor shall a writ of injunction be granted to stay proceeding in any court of a state." There is nothing in the bankrupt law, in terms repealing this statute, and the authority conferred by the 40th section, to issue an injunction against the bankrupt, and all other *persons*, excludes the presumption that it is to be exercised without limitation. Other "persons," here expressed, has reference to parties interfering with the property of an individual not yet adjudicated an involuntary bankrupt, and which is to be preserved inviolate, until his bankruptcy has been legally ascertained. It does not refer to the courts of a

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state, or to their executive officers. It was not designed to arrest the whole machinery of another and independent forum, which is exercising its best efforts to marshal the assets of the debtor, and after discharging the legitimate liens to which they are subject, reserving the residue, as a fund for the assignee in bankruptcy.

Liens, by this law, as they should be, are held sacred. To say that the vigilant creditor, who by his diligence has secured his debt, and has a valid lien upon the property of the bankrupt, shall come in with all the other creditors, *pro rata*, would be a perversion of the purposes of congress in the passage of the act. No right acquired by the creditor is affected or impaired. The 14th section expressly protects him. The assignee has authority, under the direction of this court to discharge any *lien* upon any property, *real* or personal, and is authorized to sell the same, *subject* to such lien or other incumbrances. By the 15th section he is permitted to sell all *unincumbered* estates, real and personal, on such terms as he thinks most for the interest of the creditors. Where there is a *lien* on real or personal property, the 20th section admits the holder of the lien as a creditor in bankruptcy, for the *balance* of the debt, after deducting the value of the property, to be ascertained by agreement or sale; or the creditor may release or convey his claim to the assignee, and be permitted to prove his *whole* debt in bankruptcy.

These several sections are distinct recognitions by congress of the sanctity of liens, obtained before the inception of proceedings in bankruptcy, and they control, and are a limitation of the sweeping provisions of the first section. It is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together.

All liens, then, remain intact. The bankrupt's final certificate operates to discharge his person and future acquisi-

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tions, while, at the same time, the mortgagee, or other lien creditor, shall be permitted to have their satisfaction out of the property mortgaged or subject to lien. A legal right without a remedy would be an anomaly in the law. *Peck v. Jenness*, 7 Howard, 623.

It is true that the first section of the act declares that the jurisdiction conferred on the * district court of xxxvii the United States shall extend to "all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy." But as the supreme court of the United States say, in that very able opinion delivered by my brother, Mr. Justice Grier, in the case of *Peck v. Jenness*, before quoted in 7 Howard, the court of common pleas of Armstrong County have full and complete jurisdiction over the parties and the subject matter; and its jurisdiction had attached long before any act of bankruptcy was committed. It is an independent tribunal, not deriving its authority from the same sovereign, and, as regards the district court, a foreign forum, in every way its equal. The district court has no supervisory power over it.

When the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity but in necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or *other process*, for this would produce a conflict of jurisdiction extremely embarrassing in the administration of justice. The fact, therefore, that an injunction issues only to the *parties* before the court, and not to the court itself, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.

It follows, therefore, that this court has no supervisory

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power over the court of common pleas of Armstrong County by injunction or otherwise, unless it is conferred by the bankrupt law. But we cannot discover any provision in that act which limits the jurisdiction of the state courts, or confers any power on the bankrupt court to supersede their jurisdiction or wrest property from the custody of their officers. On the contrary it provides, in the 14th section, that the assignee "may prosecute and *defend* all suits at law or in equity, pending at the time of the adjudication of bankruptcy, *in which such bankrupt is a party*, in his own name, in the same manner and with *the like effect*, as they might have been prosecuted or defended by such bankrupt." In other words, as to the estate and property of the bankrupt, the assignee is subrogated to all his rights and responsibilities. The act sends the assignee to the state court, and admits its power over him. It confers no authority on this court to restrain proceedings therein, by injunction or other process, much less to take property out of its custody or possession with a strong hand.

Finding no such grant of power either in direct terms or by necessary implication from any of the provisions of the bankrupt law, we are not at liberty to interpolate it on any supposed grounds of policy or expediency. We shall therefore be compelled to dissolve this and all other injunctions, in similar cases.

I have not submitted this opinion to my brother Grier, but it may be a source of gratification to the profession to learn that, sitting with him, recently, at circuit in Philadelphia, we conferred upon this case, and I am pleased to say that we concurred in the legal principles upon which it should be decided.

Injunction dissolved.

In re Alfred L. Wells, Jr.

U. S. DISTRICT COURT, N. D. NEW YORK.

Where a trader stops payment of his commercial paper and does not resume payment thereof within fourteen days, he commits an act of bankruptcy.

In re ALFRED L. WELLS & ALFRED L. WELLS, JR., *ex parte* H. B. CLAFLIN & Co.¹

HALL, J. The petition in this case alleges two acts of bankruptcy, namely: *First*. That on or about the 16th of March, 1867, the said Alfred L. Wells & Son, being possessed of a certain estate and property (to wit: a stock of dry goods and other articles, together with divers accounts against persons to whom they had sold goods, &c.), made an assignment of the whole of them, *with intent to delay and hinder their creditors*; and *Second*. That on or about the 16th of March, 1867, being merchants and traders, they fraudulently stopped and suspended, and had not resumed payment of their commercial paper within a period of fourteen days.

The petition also shows that at the time above mentioned the firm was insolvent; that judgments had been taken against them; and that suits upon other demands against them had been commenced, and were being prosecuted to judgment and execution.

The execution of a general assignment for the common and equal benefit of all their creditors, is admitted; but it is denied that it was executed with the intent to delay or hinder creditors. As there is no replication to the answer containing this denial, and as the case has been brought to a hearing on the petition and answer, this intent, if it be not conclusively presumed as a matter of law, must be regarded as disproved; and as there is no allegation that the assignment referred to was made with intent to defeat or delay the operation of the bankrupt act, we are not now called upon to decide whether a general assignment making a disposition of the bankrupts' property substantially the same as that contemplated by the

¹ Cited in *Jersey City Window Glass Co.* 1 N. B. R. 113, quarto; *Ballard & Parsons*, 2 N. B. R. 84, quarto.

This case does not decide that a general assignment for the benefit of creditors is not an act of bankruptcy
Emmons, Globe Ins. Co. v. Cleveland
Ins. Co.
2 N. B. R. 277.

In re Alfred L. Wells, Jr.

bankrupt act, can be considered an act of bankruptcy if made in good faith before the first day of June last, (and consequently before any petition could be filed under that act,) and for the single purpose of preventing a portion of his creditors from obtaining a preference over his other creditors.

We think there is no conclusive legal presumption that the assignment was made to delay or hinder creditors. It may, perhaps, be truly said it was made with intent to delay and hinder the particular creditors who were striving to obtain a preference over the other creditors of the respondents, by pressing the suits they had already commenced to judgment and execution; but this intent is not such an intent as the bankrupt act contemplates. Such an assignment, under such circumstances and with such intent, would not be held void under the statute of this state, which avoids conveyances made with the intent to delay, hinder, or defraud creditors; and notwithstanding the provision of the 35th section of the bankrupt act, that a sale, assignment, transfer, or conveyance not made in the usual course of business of the debtor, shall be *prima facie* evidence of fraud, we are of the opinion that, *under the denials contained in the answer* in this case, we cannot properly hold that the making of the assignment, under the circumstances stated, was an act of bankruptcy.

Upon the second allegation of an act of bankruptcy, the petitioners are entitled to an adjudication in bankruptcy against the respondents. It is true that the construction of the provision of the bankrupt act on which this allegation is based, is not entirely free from doubt, but the construction which justifies such an adjudication has been adopted in another district, and is, as we think, a reasonable and just construction of such provision. It was contended upon the argument that this provision, which authorizes proceedings *in invitum* against any person, "who being a banker, merchant, or trader, has fraudulently stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," does not authorize such proceedings unless the original stoppage or suspension of payment was fraudulent — no matter how long such suspension may be continued.

In re Alfred L. Wells, Jr.

We understand that the United States district court of South Carolina has decided that such is not the true construction of the provision referred to, and that its true construction requires an adjudication in bankruptcy against a banker, merchant, or trader who "has suspended and not resumed payment of his commercial paper within a period of fourteen days," although such suspension or stoppage of payment was not fraudulent; and this, we think, is the fair and proper construction. The provision embraces the two cases; the one of an original fraudulent stoppage of payment, in which proceedings may be instituted at once; and the other of a suspension of payment not fraudulent, and not *per se* an act of bankruptcy, but which, if continued for more than fourteen days, becomes an act of bankruptcy by its continuance.

The construction of the language of this particular provision under consideration, is, we think, best calculated to carry out the general intentions of congress, as expressed in the bankrupt act; and such construction, if not strictly required by, is certainly not inconsistent with the language of the particular provision alluded to.

It can hardly be supposed that congress intended that the creditors of a banker, merchant, or trader who had *fraudulently* stopped payment of his commercial paper, should be compelled to allow him fourteen days to consummate his fraudulent purposes, and perhaps secretly remove from the United States with the mass of his property before they could take proceedings against him. There is certainly no more reason for allowing such delay after a fraudulent act of that character than there is in a case where a bankrupt has fraudulently concealed or transferred a portion of his property. But when the suspension of payment is from necessity *and without fraud*, the period of fourteen days is properly allowed

* the honest trader, that he may, in case he is insolvent xxxviii and is only temporarily embarrassed, take the necessary measures to enable him to pay his dishonored paper, and prevent his business being broken up by proceedings in bankruptcy. The accidental loss or miscarriage of expected

In re S. & M. Burns.

remittances ; the unexpected failure of a correspondent or of a bank in which his deposits are kept ; the failure of his debtors to meet their commercial paper ; or any other of the many misfortunes and accidents incident to commercial and financial operations, may compel an entirely solvent and perfectly safe merchant or trader to suspend for a day or two the payment of his commercial paper ; but a merchant of fair character, who is solvent and deserving of credit, can, by means of temporary loans or otherwise, provide for resuming payment of his commercial paper within the fourteen days allowed by the bankrupt act. A suspension continued for a longer period may well be considered as evidence of hopeless insolvency or of a want of adequate capacity to carry on his business, and as entitling his creditors to take proceedings to secure the application of his property to the payment of his debts. Between these two classes — between the honest trader who suspends payment by reason of misfortune or accident, and the fraudulent one who stops payment that he may retain and secure his means for the future benefit of himself or family, to the exclusion of his creditors — congress has, we think, very properly made a clear distinction ; a distinction which can only be acted upon by adhering to the construction heretofore given to the provision referred to by the only district court which has, within our knowledge, passed upon this question.

U. S. DISTRICT COURT, W. D. PENNSYLVANIA.

The principle decided in *Campbell's case* that the district courts of the United States have no power to issue injunctions to state courts, affirmed.

A judgment cannot be assailed in the bankrupt court, but the assignee and creditors must resort to the state court, to test its validity.

In re S. & M. BURNS, ex parte WILLIAM BURNS.

M'CANDLESS, J. This case was argued at the same time with that of Hugh Campbell (*ante* p. xxxvi), and the principal point presented has been there decided.

In re S. & M. Burns.

It differs in this — Burns is a voluntary bankrupt. His petition was filed on the 31st of July, 1867, and he was duly adjudged a bankrupt. The First National Bank of Clarion, a creditor of the firm of which the bankrupt was a partner, on the 18th of July, 1867, obtained judgment on warrant of attorney dated 9th of July of the same year, for the sum of \$10,300. A *fi. fa.* was issued, and a levy made by the sheriff of Jefferson County on merchandise and lumber, at what date from the imperfection of the paper book this court is unable to say, but prior in date to the commencement of the proceedings in bankruptcy.

It was alleged at the argument that the note, of which this judgment is predicated, was given under promise not to sue out a writ of execution, but to be held as a security, and to afford the firm of which the bankrupt was a partner, an opportunity to make some arrangement with their creditors. That in violation of this agreement, and in fraud of the 35th section of the bankrupt law, the judgment was entered, execution was issued, and levy made. Before the date fixed by the sheriff for his sale, we were asked, by petition, to enjoin the Clarion Bank and the sheriff from proceeding further with their writ, and directing them to deliver the property upon which the levy was made, to the assignee in bankruptcy. This we did, at the same time admonishing the counsel of the doubts entertained as to the power of this court, and suggesting a motion to dissolve, which was granted. Upon this point they have been fully heard, and the question has been decided to-day in *Campbell's case*.

It was urged with great force and ability by the counsel for the bankrupt that we were bound to interfere by injunction, because this was not a *valid* judgment. But how do we know that? It is entered in a court of competent jurisdiction, whose authority it is our duty to respect. If it is fraudulent or void, under the bankrupt law, it is the province of the assignee in bankruptcy, who stands in the attitude of a defendant, to see, in that forum, that no injustice is done to the general creditors.

In re Mary A. O'Brien.

By the first section of the fourth article of the Constitution of the United States, it is declared "that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state;" and this is equally binding on the courts of the United States.

We must therefore refer the assignee in bankruptcy, as the representative of the defendant, and of all the creditors, to the court of common pleas of Jefferson court.

Injunction dissolved.

U. S. CIRCUIT COURT, N. D. NEW YORK.

Where an appeal from an adjudication of bankruptcy was made from the district courts to the circuit court:

Held, Such appeal would not lie, and should be dismissed for want of jurisdiction.

In re MARY A. O'BRIEN.

NELSON, J. The decision in the court below, and which is sought to be revised on this appeal is, that a feme covert, a trader, is within the bankrupt act of the 2d March, 1867, and may be declared a bankrupt.

A preliminary question is raised, and must first be disposed of, and that is, whether the adjudication is one that may be revised on an appeal to this court?

The second section of the act is chiefly relied on, which declares "that the several circuit courts of the United States, &c., shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may upon bill, petition, or other process, of any party aggrieved, hear and determine the case in a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof in term time, or vacation." Concurrent jurisdiction is also given to the circuit courts with the district courts in suits by the assignee in bankruptcy against any person claiming an interest in the property of the bankrupt, or by such person against the assignee. Although the language

In re Julius Schick.

of the fore part of this section is very broad and comprehensive, and the scope of it difficult to understand, yet we are inclined to think that, in connection with other provisions of the act, it must be construed as relating to cases of original, and not of appellate jurisdiction. If construed to relate to the latter, it is apparent that every question decided by the district courts in the course of the proceedings in bankruptcy, would be subject to an appeal, which could hardly have been the intention of congress. But what, in our judgment, is decisive of this construction is, that the subject of appeals to this court from the district courts is specially provided for and limited.

The 8th section declares that appeals may be taken from the decision of the district courts in two cases: *First*, By the creditors whose claim against the bankrupt has been wholly or in part rejected; and *Second*, By the assignee who is dissatisfied by the allowance of any claim. These two appeals arise out of the decisions of the district court in the course of the bankrupt proceedings proper, and are the only instances of the kind provided for. They are distinct from appeals in cases in equity arising under the act, when the debt or damages amount to more than \$500. The 24th section provides for the mode of appealing by the aggrieved creditors, and one of the rules in bankruptcy carries it out more in detail. Having arrived at the conclusion that the decision is not the subject of an appeal, and hence, that this court has no jurisdiction of it, the question on the merits is not before us, and will not be examined. *Appeal dismissed.*

U. S. DISTRICT COURT, S. D. NEW YORK.

Where judgment, shown to be fictitious, was obtained against debtor prior to the passage of the bankruptcy act, on which judgment execution was issued and property of the debtor was levied upon after the passage of the act:

Held, That the debtor had procured or suffered his property to be taken by legal process, and had transferred his property with intent to delay, hinder, and defraud his creditors, and had thereby committed acts of bankruptcy.

In re Julius Schick.

In re JULIUS SCHICK.

A PETITION was filed in this case by creditors of the debtor, praying that he should be declared a bankrupt. The facts are sufficiently set forth in the opinion of the judge.

BLATCHFORD, J. The debtor having denied the acts of bankruptcy set forth in the petition, evidence has been taken orally before the court, on the part of the petitioners and the debtor.

The only act of bankruptcy set forth in the petition, which it is important to consider, is that arising out of the judgment obtained by Raphael J. Cowen, against the debtor, on the 16th of February, 1867, for \$2,005.51 in the supreme court of New York, for the city and county of New York. On that judgment an execution was issued, soon after the judgment was recovered, but it was almost immediately countermanded by Cowen, and nothing further was done in regard to the judgment until the 18th of October, 1867, when a second execution was issued upon it to the sheriff of the city and county of New York, under which the sheriff has xxxix * levied upon the stock of cloths and clothing contained in the debtor's store in the Third Avenue in the city of New York, and now holds the same. The property so levied upon, is substantially all the property which the debtor has.

It is alleged on the part of the petitioning creditors that this judgment is wholly fictitious and fraudulent, and that the debtor did not owe Cowen anything, and that the judgment was procured by the debtor to be recovered for the purpose of covering up his property from liability to be seized by his creditors.

The portions of section 39 of the bankrupt act, under which it is sought to have the debtor adjudged a bankrupt in this case, are the provisions, that any person residing within the jurisdiction of the United States, and owing debts provable under the act, exceeding the amount of three hundred dollars, who, after the passage of the act, being insolvent, shall procure or suffer his property to be taken on legal proc-

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ess, with the intent, by such disposition of his property, to defeat or delay the operation of the act, and any such person who shall make any transfer of his property, with intent to delay, hinder, or defraud his creditors, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions thereafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, the aggregate of whose debts, provable under the act, amounted to at least \$250, provided such petition is brought within six months after the act of bankruptcy shall have been committed.

I am satisfied from the evidence that the debtor was insolvent when the execution was issued, on the 18th of October, 1867, on the judgment recovered by Cowen, and when the property of the debtor was taken by the sheriff on such execution. All the minor conditions required by the provisions cited exist in regard to the debtor. The only disputed question is as to the *bona fides* of the judgment. In regard to that, I am compelled to come to the conclusion that the judgment was wholly fictitious, and was a device set on foot by the debtor to enable him to coerce creditors of his who were pressing him at the time, to make favorable arrangements with him and give him time, and that he did not owe Cowen anything at the time the judgment was recovered. Although the debtor and Cowen both of them swear to the *bona fides* of the debt to Cowen, and of the judgment, yet it is proved by four separate and credible witnesses, that, on as many different occasions, the debtor declared to each of them in substance, that the judgment was a fiction, and was procured to protect his property, and that he owed Cowen nothing. The debtor, although examined as a witness, did not deny having so stated to them, nor did he attempt to give any explanation in regard to such statements. Moreover, there are many surrounding and collateral circumstances in the evidence, pointing in the same direction. Although the bankrupt act had not been passed when the judgment was recovered, yet it was in force when the prop-

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erty of the bankrupt was taken on the execution ; and the inaction or non-action of the debtor in taking no steps to set aside the fictitious judgment and prevent a second execution from being issued on it, must be held to have been, under the circumstances, a procuring or suffering by him of his property to be taken on legal process. The consequence of the taking of such property on the execution must be held to involve a probable defeat or delay of the operation of the bankrupt act, and the debtor must be held to have intended such consequence by procuring or suffering his property to be so taken. I think also that the transaction was, in substance and effect, within the provisions of section 39, a transfer of the property of the debtor made by him, and so made with intent to delay, hinder, and defraud his creditors.

It follows that the debtor must be adjudged a bankrupt. This proceeding, however, is, so far, one merely between the petitioning creditors and the debtor. Cowen is no party to it, although examined as a witness for the debtor ; and, in the further progress of the matter, if the assignee of the debtor, to be appointed, should institute proceedings to realize for the benefit of the debtor's estate in bankruptcy, the property levied on by the sheriff under the execution, Cowen will have a full opportunity to assert his rights, and maintain, if he can, the integrity of the judgment, and there is nothing in this adjudication to preclude him from doing so.

November, 1867.

Register had no power, November 1867, to take affidavits in involuntary bankruptcy.

IN the district court for the Northern District of New York, in bankruptcy, before Judge Hall, on the 15th November, 1867, Mr. Gorham presented a petition in involuntary bankruptcy, which was sworn to before Register Ames. Judge Hall declined to allow the petition to be filed, or to grant an order to show cause — stating as a reason that a register in bankruptcy had no power to take an affidavit to the petition in involuntary bankruptcy. [See Form 54. — Ed.]

Ex parte Donaldson.

U. S. DISTRICT COURT, E. D. PENNSYLVANIA.

An unimpeached creditor's lien having, before the commencement of voluntary proceedings in bankruptcy, attached upon part of bankrupt's estate, no consideration of probable sacrifice of the subject of the lien under judicial proceedings for its enforcement in a state court, will induce a court of the United States to restrain, delay, or hinder the creditor from prosecuting them.

No equity of the general body of the bankrupt's creditors can be asserted for their common, equal benefit, on the mere ground of doubtfulness of his title to the subject of his lien and the danger of consequent sacrifice at a forced sale.

Quære, whether such an equity can be asserted on their behalf in any case without such a payment of his demand as may substitute the assignee in bankruptcy for him as to the lien.

Ex parte DONALDSON.

A PETITION is this day presented by a voluntary bankrupt whose original petition for adjudication and relief was filed on the 6th of the present month. He was adjudged a bankrupt by the register on the 12th, when a warrant was issued appointing the first meeting of creditors for 16th of September next. The present petition referring to a judgment obtained in April last under adversary proceedings against the petitioner, and to an execution under it, asserts that real estate already sold by the sheriff under this execution is alleged by the plaintiff to be the petitioner's, but is denied by the petitioner to be his property. Having been advised that should it ultimately be determined to be his property, it "should go to the benefit of all his creditors in bankruptcy," he presents this petition. The sheriff's deed of conveyance had not been acknowledged. The prayer is for an injunction to restrain the plaintiff from proceeding further on the judgment and execution, "and from having the deed for said property acknowledged by the sheriff." The petition does not expressly state that the plaintiff is the purchaser.

Mr. Parsons, for the petitioner, urged the hardship of permitting such a sale, under a doubtful title, to be made, as it must inevitably be at a sacrifice. He submitted to the court

Ex parte Donaldson.

the question whether it would not be proper to interfere for the protection of the general body of the creditors. He referred to the *Case of Reed* (*ante*, page i.), a bankrupt, on whose petition Judge Blatchford, in the district court of the southern district of New York, had, by injunction, restrained a plaintiff in a judgment and execution against the bankrupt in the supreme court of New York from proceeding with an examination of him as a judgment debtor in that court under a law of the state.

CADWALADER, J. The case before Judge Blatchford which has been cited, has no apparent applicability. There was no question of an existing lien of whose fruits the creditors, holding it, were to be deprived. Here the equity of the general body of the creditors might be to require the proceedings, against the land in question, to be for common benefit subject to the lien of the judgment creditor. But in asserting this equity, the general creditors must not frustrate the right of the judgment creditor to his lien. If there was any probability of a proceeding for common benefit at the suit, either of the future assignee or of a provisional assignee, to establish the title of the bankrupt's general creditors to the land subject to the judgment creditor's lien, I might, under some circumstances, restrain him from selling, in the mean time, at a sacrifice under his execution. This would be a jurisdiction to exercise with great caution; and might, in some cases perhaps, be exercisable under a bill in equity in aid of the proceedings in bankruptcy rather than under these proceedings themselves.

The case may stand over for further consideration. In the mean time, if reason be shown, I may appoint a receiver to act as provisional assignee until the complete qualification of an assignee under the provisions of the act of congress. Such an assignee could inform himself as to the true interests of the general body of creditors. If a mode can be suggested of promoting their interests, without other injury to the judgment creditor than mere delay until a decision upon the title of the bankrupt, an injunction might possibly

In the Matter of the Publication of Notices.

be proper. But under what circumstances this might thus be proper, cannot be suggested beforehand.

The foregoing opinion having been filed, the * judge xl added : My last remarks are made only, because I do not wish to preclude further argument if it should be desired. At present, I do not see how I can possibly interfere unless upon an offer on the part of the general creditors to make such payment of the judgment creditor's demand as may substitute the assignee in bankruptcy for him as to the lien of the judgment ; nor how even this can be done after an actual sale by the sheriff, though the purchaser's title may not have been consummated. I do not pause to consider whether the bankrupt is the party who should have presented the petition if it were otherwise a proper one. Perhaps before assignment, it may, under this act of congress, be necessary in some cases to allow him to make certain applications which, after assignment, would be more proper on the part of the assignee.

The matter was not afterwards moved.

U. S. DISTRICT COURT, S. D. NEW YORK.

In the Matter of the Publication of Notices in Bankruptcy.

Ordered, It being desirable that uniform rates should be established as far as practicable for the publishing in newspapers published in the city and county of New York of notices in bankruptcy proceedings, and that such rates should be as low as possible consistently with the selection of newspapers of adequate circulation, and it being necessary in order to effect those ends, and desirable for the convenience of creditors, that such publications should be made in not more than two of such newspapers. It is ordered that Rule 21 of the rules in bankruptcy prescribed by this court, be, and the same is hereby amended, by striking out of the des-

In re Samuel W. Levy & Mark Levy.

ignation of newspapers in the city and county of New York, all except the Times and the Commercial Advertiser, and that the following prices, and no more, be paid for publishing in such newspapers the following notices :

In the New York Daily Times, for the publication, two times, of the notice by the marshal as messenger, under a warrant, five dollars ; for the publication, three times, of the notice by any assignee, or trustee, of his appointment, five dollars ; for the publication, three times, of the notice by the clerk to show cause against the granting of a discharge, seven dollars ; for the publication of other notices, an average of the above rates.

In the New York Commercial Advertiser for the publication, two times, of the notice by the marshal as messenger, under a warrant, four dollars and twenty-five cents ; for the publication, three, times, of the notice by an assignee, or trustee, of his appointment, four dollars and twenty-five cents ; for the publication, three times, of the notice by the clerk to show cause against the granting of a discharge, six dollars ; for the publication of other notices, an average of the above rates.

SAMUEL BLATCHFORD,
District Judge.

U. S. DISTRICT COURT, S. D. NEW YORK.

The counsellor of the assignee may act as attorney for creditors in bankruptcy proceedings.

In re SAMUEL W. LEVY & MARK LEVY.

I, ISAIAH T. WILLIAMS, one of the registers in said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Mr. Samuel Boardman, who appeared for the bankrupt, and Mr. Charles H. Smith, who appeared for the assignee and divers creditors of said bankrupt.

In re Samuel W. Levy & Mark Levy.

The respective parties this day appearing before me to proceed with the examination of Mark Levy, one of the said bankrupts, Mr. Boardman, solicitor for the bankrupts, objected that Mr. Smith who had hitherto been and was acting on said examination for and on behalf both of the creditors, and also on behalf of John Sedgwick, the assignee of the bankrupts, ought not to be allowed further to act in said capacity for said assignee on the ground that the 27th Rule of this court prohibited the same.

It was claimed on the part of Mr. Smith that he did not assume to act as solicitor or attorney for said assignee, but only in the capacity of counsel, and that in such capacity he did not contravene the provisions of said rule.

After hearing the respective parties, I decided that it was not competent, under the provisions of said rule, for Mr. Smith to act for the assignee on said examination, as he was, and from the first had been, the attorney and solicitor for divers of the creditors of said bankrupts, in taking testimony for the purpose of opposing the discharge of the bankrupts.

And I further certify and report to this honorable court, that the grounds for said decision were as follows :

First. Although the word "counsel" is not used in said rule, yet, as the proceedings before me were in the nature of chamber business rather than proceedings in open court, the distinction between attorney and counsel could not be regarded.

Second. That if the distinction between the office of attorney and counsel, now contended for, were to prevail, it would render the said rule wholly inoperative.

Whereupon Mr. Smith requested that the question should be certified to the judge for his opinion thereon. Dated the 7th day of December, 1867. I. T. WILLIAMS, *Register*.

BLATCHFORD, J. In consequence of embarrassments similar to that certified in this case, the 27th Rule has been vacated, leaving any case in which any ground of complaint exists against an assignee on account of any matter con-

In re Moses Selig.

nected with his employment of an attorney or solicitor, to be brought before the court for its action.

The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

December 7, 1867.

U. S. DISTRICT COURT, E. D. NEW YORK.

Where an assignee, who was also a creditor, neglected to make his report on the return day of the order to show cause why bankrupt should not be discharged, but subsequently appeared before the register and applied for an order for examination of bankrupt's wife :

Held, that such order should be refused, as it did not appear to have been made in good faith.

In re MOSES SELIG.

I, DAVID C. WINSLOW, one of the registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: George Wilcox, for the assignee, and Benedict & Boardman, who appeared for the bankrupt. The usual order was made by me for creditors and others to show cause before me, on the 18th of November, at ten A. M., why the bankrupt should not be discharged from his debts, and for second and third meetings of creditors.

Notice was served upon Stephen Hyatt, who was both a creditor and assignee, by the clerk, as appears by his certificate.

On the return day the bankrupt appeared with his attorney, and moved for a certificate to the effect that he was entitled to a discharge, which was granted upon producing the affidavit of the assignee, per Form 35.

The assignee had not filed his report, and his attorney, S. A. Underhill, was requested by the register and the attorney for the bankrupt to call upon him for that return

In re Moses Selig.

which he did on that day, but the assignee refused to make the return. On the 19th an order was made requiring the assignee to make his return to show cause before me on the 21st, at one P. M. Previous to that hour, but on the same day, Mr. George Wilcox, on behalf of the assignee, applied, upon affidavit of the assignee, for an order for the examination of the bankrupt's wife, which I then denied, with liberty to apply at one P. M., the hour fixed for the assignee to make his return or show cause. At that hour the assignee renewed his motion for an order to examine the bankrupt's wife, and at the same time filed the assignee's return as required by law. The attorney for the bankrupt objects to the granting of the order applied for, upon the ground that the application comes too late, the time to show cause, and for the second and third meetings of creditors, having been held on the 18th, and all the bankrupt's proceedings having been regular; there being no opposition at that time, he would have been entitled to a certificate from the register upon which a certificate of discharge would have been granted by the court, had the assignee performed his duty, and made his return at the proper time. That return not having been made, the register could not certify that all the proceedings were regular, and hence the bankrupt has been delayed in obtaining his discharge.

The bankrupt himself was examined upon the application of the assignee on the 22d of October last.

I refuse to grant the order for the examination of the wife of the bankrupt upon the grounds,

1. The assignee is guilty of laches. Had he made his return at the proper time, the bankrupt would have obtained his discharge.

The assignee cannot take advantage of his own wrong. He had actual notice, as a creditor, of the meeting referred to, and knew it was his duty as assignee to present his report at that time.

Besides this, he was called upon by his attorney to make his report, and refused to do so.

In re Isaac Clark.

2. The examination of the wife of the bankrupt is not a matter of right. "She may be required to attend before the court for good cause shown," section 26. I do not think good cause has been shown; on the contrary, I think the application is not made in good faith, but for the purpose of delaying the bankrupt in obtaining his discharge, to which he is clearly entitled as the matter now stands. He makes no excuse whatever for not making his return at the proper time, nor for not making this application at an earlier date.

xli The *affidavit upon which the application is made does not state a solitary fact, nothing but suspicion and belief.

It must be borne in mind that the applicant is a creditor as well as assignee, and his zeal may not be altogether official.

And the said parties requested that the same should be certified to the judge for his opinion thereon. Dated at Brooklyn, November 22, 1867.

D. C. WINSLOW, *Register.*

BENEDICT, J. The decision of the register not to grant an order for the examination of the wife of the bankrupt upon the ground that the application was not made in good faith, but merely for delay, is confirmed.

November 28, 1867.

U. S. DISTRICT COURT, E. D. NEW YORK.

Upon return of an order for examination of bankrupt, the attorney for creditor not being ready, the examination was postponed at his request; a question arising as to the fee of the register in the premises:

Held, That a register is not entitled to a fee of five dollars upon such an adjournment, as for a day's service.

In re ISAAC CLARK.

IN this case, Register Winslow certifies that G. A. Seixas, attorney for a creditor who had proved his claim, applied for an order for examination of bankrupt, which was granted.

In re Isaac Clark.

Upon the return of the order the bankrupt appeared for examination with his attorney, but the attorney for the creditor was not ready, and at his request the examination was postponed.

The attorney claimed and insisted that the register's fees for services in taking examination of bankrupt under an order for that purpose, and granted upon the application of a creditor, were paid out of the bankrupt's deposit under section 47, eleventh paragraph; that an adjournment of an examination without taking any testimony was merely a meeting under third paragraph of same section, and \$3 are the fees therefor instead of \$5, under the eighth paragraph of same section; that the meeting at which testimony is taken, is only to be charged for under same section, third paragraph, \$3.

The register claimed that this was a day's service under a special order, the order for the examination, and that the register's fee was (\$5) five dollars, section 47, sub. 8.

1. Section 47 prescribes the register's fees, and when paid by the bankrupt, he is to pay according to those rates, and when the services are rendered for creditors and others, they are to pay according to the same rates.

Section 4 provides that "the fees of said register as established by this act and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered, in the course of proceedings authorized by this act."

This service was not rendered for the benefit of the bankrupt, and upon no pretence can he be called to pay for it. The service is for the benefit of the creditor; he is in search of concealed assets, or is endeavoring to show that his claim is of such a nature that a discharge in bankruptcy will not wipe it out, or is searching for facts to defeat the proceeding altogether; so his claim may stand until barred by the statute of limitations if not paid.

2. The fee for this service is chargeable under the eighth subdivision and not under the third.

In re Francis Schnepf.

Judge Blatchford has held in *McIntire's case* (*ante*, p. iii.), that the meeting referred to in the third subdivision and elsewhere, means a "meeting of creditors" such as is spoken of in section 12, pages 27 and 28.

BENEDICT, J. Upon the question certified in this case by Register Winslow on November 22, 1867, I am of the opinion that a register is not entitled to five dollars upon an adjournment of an examination as for a "day's service, while actually employed under the special order of the court," where, on the application of an opposing creditor, an order has been made by the register that the bankrupt attend and be examined before him, and on the day fixed for such examination, the bankrupt appeared, but the opposing creditor was not ready, and accordingly examination was postponed.

U. S. DISTRICT COURT, E. D. NEW YORK.

Judgment was obtained in a state court and execution issued thereon, and levy made by sheriff on debtor's property before he filed his petition in bankruptcy. *Held*, That the lien of the judgment creditors was good, and was not disturbed by the filing of said petition.

The bankruptcy court has power in such case to allow the goods to be sold under the execution, or to enjoin proceedings thereunder, and to order the assignee to take possession and sell the goods, with leave to the judgment creditors to apply for an order to have their liens satisfied out of the proceeds.

In re FRANCIS SCHNEPF.

THIS was a motion to dissolve an injunction restraining creditor from proceeding to sell personal property levied upon prior to commencement of proceedings in bankruptcy. The bankrupt filed his papers on the 9th of October, and was declared a bankrupt, and procured an injunction prohibiting creditors named Cammeyer & Mason from enforcing a levy which the sheriff had made upon Schnepf's property under a judgment against him which they had obtained in a state court.

In re Francis Schnepf.

The affidavits on behalf of the bankrupt showed that he had prepared his papers to take the benefit of the act in September, 1867 ; that the summons in the suit of Cammeyer & Mason was served on him on September 17th ; that after that service he sent to them showing them the state of his affairs, and offering them a compromise of their debts at forty cents on the dollar, telling them that he should go into bankruptcy if they did not take it ; then on the 8th of October he sent again to them, and they requested till the next day to consider it, and gave him to understand that they would not proceed in their suit in the mean time ; but on that afternoon entered judgment against him by default, and issued execution, on which the sheriff made the levy that night, and he filed his papers the next morning.

BENEDICT, J. This is a motion in behalf of a judgment creditor of a bankrupt to dissolve an injunction heretofore issued by this court, restraining him from proceeding to sell under an execution certain personal property levied upon prior to the filing of the petition in bankruptcy. The motion is opposed by the bankrupt, on the ground that the judgment under which the judgment creditor seeks to proceed, was obtained in fraud of the bankrupt act, and by the assignee in bankruptcy, on the ground that the title of the property in question was vested in him as an officer of the court, and no person can be permitted to dispose of or interfere with it, except under the order of the bankrupt court, to which the property has been transferred by operation of law.

The facts attending the judgment are so fully spread out in the papers before me, and are so simple in their character, that I can without injustice dispose of the question as to the validity of the judgment on the affidavits alone. Upon that question I should gladly hold in favor of the bankrupt if I could do so, as I by no means approve of the manner in which the judgment was obtained ; but I do not see how the judgment can be held fraudulent upon the facts. It was obtained in the regular course of judicial proceedings, instituted adversely to the debtor and without collusion. It was

In re Francis Schnepf.

entered for an amount admitted to be justly due, and the entry was made as it was, not with the assent of the debtor, but in spite of him. It is in law a valid judgment obtained without fraud or collusion, and can in no proper sense be said to have been procured by the bankrupt with a view to give a preference. This being so, the judgment creditor, by his levy made prior to the filing of the bankrupt's petition, acquired a security for his debt in the property levied on.

The next question arising is whether such a security is invalidated by the provisions of the bankrupt act, and upon this question I have heretofore had occasion to express an opinion, which I see no reason to modify. It seems to me that such a security is preserved and entitled to be protected, upon general principles of law, and that the general scope of the bankrupt act indicates that such was the intention of the framers of the act. (*Parker v. Muggridge*, 2 Story, 343.)

The remaining question then is as to the manner in which this right of the judgment creditor shall be protected. Two methods are open, by either of which the debt will be secured. One is to allow the creditor to proceed to sell the property at sheriff's sale, in which case, as the affidavits show, there will be little or no surplus for the other creditors. The other is to direct the assignee in bankruptcy to take possession of and sell the property at private sale, in which case, as also appears by the affidavits, a sum can be realized not only sufficient to pay the judgment, but to leave a considerable sum for the other creditors. As between these two methods upon such a state of facts, it cannot be doubted that it is the duty of the bankrupt court, charged as it is with the interests of all the creditors, to prevent the sacrifice of this property by a sheriff's sale, and direct a sale by the assignee, provided the power to do so has been conferred by the act.

A discussion of the question of the power of the court in the premises is rendered unnecessary in this case, inasmuch as the power is conceded to exist by the judgment creditor, and no objection is made to a disposal of the property by the assignee instead of the sheriff. I postpone, therefore, the

In re George W. Kimball.

discussion of that point until *a case shall arise where xlii
it is raised, with the remark that such a power seems
necessary to a proper administration of the bankrupt law, and
that it would seem to be fairly included in the power conferred
by the act to collect all the assets of the bankrupt, to ascertain
and liquidate all liens or other specific claims thereon, or to
adjust priorities and marshal and dispose of the different
funds and assets so as to secure the rights of all persons and
the due distribution of the assets among all the creditors.

• The motion to dissolve the injunction will therefore be
denied, and an order entered directing the assignee to take
possession of the property levied upon, and sell the same,
without delay, and to the best advantage, with liberty to the
judgment creditors, immediately upon such sale, to apply for
an order directing the payment of their judgment out of the
proceeds of such sale.

U. S. DISTRICT COURT, S. D. NEW YORK.

While on his way to be examined as a witness under an order of the register,
a bankrupt was arrested on mesne process issued by a state court.

Held, That the arrest was a violation of his privileges, and that he was entitled
to be discharged. But, *semble*, it appearing from the affidavits, though not
averred in the complaint, that the debt was fraudulent, bankrupt would be li-
able to be rearrested when such privilege ceased.

In re GEORGE W. KIMBALL.¹

BLATCHFORD, J. This is an application to discharge from
imprisonment the bankrupt in this case, who is confined in
close custody in Ludlow Street Jail by virtue of an arrest
made by the sheriff of the city and county of New York. The
bankrupt was declared a bankrupt by this court on the 16th
of November, 1867, on the petition of one of his creditors.
By the order of adjudication the case was referred to one of
the registers in bankruptcy, Mr. Isaiah T. Williams, and
Mr. Williams, in pursuance of the authority granted by the

¹ Cited in *Devoe's case*, 2 N. B. R. 11, *quarto*; and 2 *Ib.* 74, *quarto*.

In re George W. Kimball.

bankruptcy act, issued an order under the 26th section of the act, according to Form No. 45 of the forms in bankruptcy, requiring the bankrupt to attend before him, to submit to an examination, on the 6th of December, 1867. After the bankrupt had been served with this order, and a few moments before the hour appointed for the examination, and while the bankrupt was on his way to the office of the register, and was in the same building in which the office of the register is situated, with the order for such examination upon his person, he was arrested by the sheriff, upon an order of arrest issued as mesne process in a civil suit in the supreme court of the State of New York; and he applies now to this court to be discharged from his imprisonment, upon the ground that he was arrested while he was on his way, under the process of this court, to be examined thereunder.

There is no statute of the United States, as there is of the State of New York, giving protection to a witness from being arrested in a civil suit, while he is in process of obeying a subpoena issued from a competent court for his examination as a witness.

I have heretofore decided that a bankrupt, in all matters relating to his examination, under the 26th section of the bankruptcy act, is substantially a witness, and that he is to be examined and cross-examined as a witness, and is entitled to be considered as a witness in all respects. The order, or summons, according to Form No. 45, which is issued and served upon him, commanding him to appear and be examined, is substantially a subpoena. The 26th section of the act provides that the court may require him to attend upon reasonable notice and submit to an examination on oath, and that if he neglects to obey any order of the court, he may be committed and punished as for a contempt of court. He must, therefore, when served with such order or summons, be regarded as a witness under a subpoena, and as entitled to the same protection to which any other witness subpoenaed to attend before a court, or an officer of the court, is entitled.

He is also a party to the bankrupt proceedings, and is entitled

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to all the protection which any party to any suit is entitled to under like circumstances. Such protection was decided by the circuit court of the United States for the District of Pennsylvania (*Hurst's case*, 4 Dallas, 387, and 1 Wash. C. C. R. 186), to be a protection to be thrown around him by the court from which the subpoena issues. In that case, the party was in attendance at Philadelphia, having gone there from his residence at New York for the purpose of being present at the trial in that court of a suit to which he was a party, and he was also under process of subpoena from that court to attend it as a witness in another suit, when he was arrested at his lodgings at a tavern in Philadelphia, by a state sheriff on a *capias ad satisfaciendum*, issued out of the supreme court of Pennsylvania. An application was made to the circuit court of the United States to discharge him from imprisonment, and it was granted by Mr. Justice Washington and Judge Peters, holding the court, who decided that the circuit court of the United States had competent authority to discharge the party from the arrest because of the breach of his privilege which had been committed; in order that the proceedings of the court might not be impeded, and that the order for such discharge would be a justification and protection to the sheriff in discharging him.

In the present case, as the order or summons was issued by this court, the application is made to it to discharge the party from his imprisonment. Although there is no statute of the United States upon the subject, yet the law is well settled that a party and a witness is, under such circumstances, entitled to be protected by the court whose process has been interrupted. The plaintiff, at whose instance he was arrested in the state court, may rearrest him under the same or other process whenever the privilege ceases; but the privilege must be enforced, and the order of this court discharging the party from his imprisonment will be a conclusive justification of the sheriff in every other court, and even in the state court itself, which issues the process. The privilege is one not merely for the benefit of the party and wit-

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ness, but exists for the purpose of maintaining the dignity and carrying out the commands of the court which issues the subpoena, and to promote public justice, it being necessary that private right should for the time being yield to the public good. (*Lyell v. Goodwin*, 4 McLean, 32.) In the present case the party was clearly entitled to his privilege, both as party and as witness, and I shall, therefore, make an order discharging him from the custody of the sheriff, upon the ground that his arrest, under the circumstances under which it was made, was a breach of his privilege.

There is another ground urged in this case for the discharge of the party from imprisonment, but which I do not regard as sufficient ground for his discharge. He claims to be discharged under the last clause of the 26th section of the bankruptcy act, which provides that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." The 33d section of the act provides "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act." The cause of action set out in the complaint in the suit in the state court, in which the party was arrested, is simply a complaint for the recovery of \$560 for goods sold and delivered to him, and the summons is a summons for a money demand on contract for \$560. There is no allegation in the complaint that the debt was fraudulently contracted, nor any averment except that so much money is due for goods sold and delivered; but the affidavits upon which the party was arrested, set forth facts which show a fraudulent purchase of the goods and a fraudulent contracting of the debt, and make out a case where the debt is one created by the fraud of the bankrupt in making fraudulent representations as to his solvency and pecuniary means and ability at the time he purchased the goods. If these averments had been contained in the complaint there would have been no

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question in the case, but they are only contained in the affidavits on which the order of arrest was granted; and the ground urged for the discharge of the party is, that under this last clause of the 26th section of the act it is necessary that the action should be founded upon the debt from which the discharge in bankruptcy would not release the party. It is clear that upon the face of the papers in this case this debt was created by the fraud of the bankrupt. Being such a debt, it is one that will not be discharged by his discharge under the act.

But it is contended on the part of the bankrupt that the words "the same" in the 26th section, "unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him," mean the action; and on the part of the plaintiff in the suit in the state court it is contended that the words "the same" mean the arrest. Whether one or the other of these two interpretations of the words "the same," in the section, is given to these words, makes a material difference; because if the interpretation of the bankrupt is the correct interpretation, that the action must be founded on the debt or claim, then it is clear that the action in the state court is not founded on a debt or claim, from which the discharge would not release him. It is founded on a naked sale of goods, with no element of fraud in it. Whereas, if the arrest is * what is to be xliii founded on the debt or claim, it is very clear that the arrest in this case was upon a debt created by fraud, and one from which the bankrupt would not be released by his discharge in bankruptcy. After a careful consideration of the language of the provision in question, and its meaning and object, in connection with the language of the 33d section, I have come to the conclusion that the good sense of the statute is, that whenever the ground of arrest in the state court is a debt created by fraud, the party is not entitled to the privilege of exemption from arrest; and it would be too narrow and technical an interpretation of the language to hold that the words "the same" refer merely to the action, although that

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is the last antecedent. The intent of the act is, I think, that whenever the party is under arrest on account of a debt created by his fraud, neither this court, nor the state court, has any right to interpose and discharge him, because of the pendency of proceedings in bankruptcy. It is contended on the part of the bankrupt that the plaintiff in the suit in the state court has, by force of what is, and what is not, contained in his complaint, waived the tort, and confined himself strictly to the contract. But that is not conclusive at all of the question. I think that when the court sees that the party is arrested, as in this case, for a debt from which he would not be discharged by his discharge in bankruptcy, the arrest and imprisonment must hold good.

The bankrupt is, however, entitled to be discharged in this case, because he was unlawfully arrested in violation of his privilege and of the authority of this court. The moment that that privilege ceases, he will of course be liable to be rearrested; and if he shall be rearrested and shall deny that this debt was created by fraud, or that it is a debt for which he is liable to arrest, this court will, on a proper representation being made to it, order a reference to inquire into the facts, and will decide whether it is or is not such a debt. But on the face of the papers now presented, I hold that the bankrupt is not entitled to exemption from arrest entirely in the case, but that the sheriff had no right to arrest him under the circumstances under which he was arrested, and that an order must be entered discharging him from such arrest.

In re Henry Bernstein.

U. S. DISTRICT COURT, S. D. NEW YORK.

Judgment was recovered, execution issued, and levy made by sheriff on the debtor's goods previously attached at the commencement of the suit. Debtor was subsequently adjudicated a bankrupt on petition of creditors, and proceedings of the sheriff were stayed in the premises, but the injunction was afterwards modified to authorize him to sell the goods and hold proceeds, subject to the order of the district court.

Held, That the lien of the judgment creditors was good, and that the sheriff should apply the proceeds in satisfaction of the judgment, including his fees and charges therein, and pay the overplus, if any, to the bankrupt's estate.

In re HENRY BERNSTEIN.

The firm of Wilmerding, Hoguet & Co. obtained a judgment against the bankrupt on the 21st of October, 1867, for \$293,300 in a suit in the supreme court of New York for a money demand on contract, founded on two promissory notes made by him, and on a sale and delivery of goods to him.

The suit was commenced on the 25th of September, 1867, and the judgment was obtained, in due course, by default, after personal service of a summons. On the same day on which the judgment was obtained, an execution was issued thereupon to the sheriff of the city and county of New York, and he made a levy thereunder on a stock of goods in the store of the bankrupt in the city of New York. The goods were advertised for sale by the sheriff for the 28th of October, 1867, but the sale was stayed by the state court, and a motion was made by the bankrupt in that court to set aside the judgment, execution, and levy, but the motion was denied. On the commencement of the suit in the state court, an attachment was issued in it under which the same stock of goods above mentioned had been attached. A motion was made by the bankrupt in the state court to dissolve the attachment, which motion was heard at the same time with the other motion before mentioned, and was also denied.

After the denial of these motions the sheriff advertised the goods for sale on the 22d of November, 1867. On the 21st of November, 1867, the petition in this matter praying for an

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adjudication of bankruptcy, was filed, and this court, under the 40th section of the bankrupt act, at the time it made an order to show cause why the prayer of the petition should not be granted, issued an injunction restraining the sheriff from selling the goods under the execution on the levy made. There has since been an adjudication of bankruptcy in this matter.

On a representation that the goods levied on were of a perishable character and were deteriorating in value, this court made an order modifying the injunction, so as to permit the sheriff to sell the goods under the execution, and directing the sheriff to hold the proceeds until the further order of this court concerning the same. The plaintiffs in the judgment now move the court to dissolve the injunction wholly, and to allow the proceeds of the sale to be applied in paying the judgment and the costs, and the charges and fees of the sheriff.

BLATCHFORD, J. There is nothing shown to impeach the *bona fides* of the judgment, execution, and levy. No collusion in regard to them appears, and the bankrupt resisted them to his utmost. The lien of a levy made under an execution issued on a final judgment such as is that in the present case, provided such lien attached before the commencement of the proceedings in bankruptcy, is preserved by the bankrupt act, and is to be respected by this court, whether this court takes to itself the administration of the property on which the lien is imposed, and applies it towards the satisfaction of the lien, or whether it allows the state officer who is executing the state process to do so.

In this case the property has been sold, and the proceeds of it are in the hands of the sheriff. No advantage can result from requiring the money to be paid into this court, with a view to its application by this court in satisfaction of the lien on the property.

An order will be entered allowing the sheriff to apply the proceeds of the sale of the property towards the discharge of the amount which he is required by the execution to make,

In re Benjamin F. Metcalf & Samuel Duncan.

including his charges and fees therein, and directing him to pay the overplus, if any, to the assignee of the bankrupt, if there be one, and if there be none, then to the clerk of this court, to the credit of the bankrupt's estate.

D. McMahon, for Wilmerding & Co., and the sheriff.

D. McAdams, for the bankrupt.

December 20, 1867.

U. S. DISTRICT COURT, E. D. NEW YORK.

Judgment was obtained in a state court, upon a debt provable in bankruptcy, against a debtor who appealed therefrom, and thereafter petitioned and was adjudicated a bankrupt. One of his sureties on the appeal becoming insolvent, judgment creditors gave notice to bankrupt to furnish new security or abandon the appeal. Bankrupt applied for injunction to restrain judgment creditors in the premises, which was granted. On motion to dissolve this injunction,

Held, It was properly granted, and would not be dissolved until bankrupt had reasonable time to obtain his discharge.

*In re BENJAMIN F. METCALF & SAMUEL DUNCAN.*¹

THIS case came before the court upon a petition filed by Henry D. Brookman and John U. Brookman, for a relief from an injunction heretofore issued by this court, restraining all proceedings in a certain cause pending in the court of appeals of the State of New York, wherein the petitioners are plaintiffs, and one of the bankrupts defendant. It appears that the case had been tried, and judgment given for the plaintiffs, which judgment has, however, been appealed from by the defendant, who has given security upon such appeal, as required by law. It also appears that one of the sureties upon the appeal has become insolvent, and the plaintiffs have, since the commencement of these proceedings in bankruptcy, given notice of a motion to compel the bankrupt to furnish new security, or abandon his appeal; whereupon the bankrupt obtained from this court, in which his petition in

¹ Cited in *Wright's case*, 2 N. B. R. 58, *quarto*.

In re Benjamin F. Metcalf & Samuel Duncan.

bankruptcy had been filed, an injunction staying all proceedings in the cause referred to, which injunction the plaintiffs in that cause now ask to have dismissed.

BENEDICT, J. The 21st section of the bankrupt act declares that "no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined." This is a very clear provision, the object of which is to prevent a race of diligence between creditors, and to protect the bankrupt from being harassed with suits pending the question of his discharge. It seems to apply to all cases where the personal liability of the debtor is sought to be fixed or ascertained by a final judgment pending the determination of the question of his discharge, and, in my opinion, it applies to a case like the present, where an action against the bankrupt is pending in the court of appeals of the state, to which an appeal has been taken by the bankrupt prior to the filing of the petition in bankruptcy. In such a case there is no final judgment within the meaning of the bankrupt act; the debtor's liability has not been finally determined, and there being no final judgment, the bankrupt act declares that the
xlv suit shall * stop, pending the determination of the question of the bankrupt's discharge.

This option to endeavor to obtain a discharge in bankruptcy, and, failing in that, to defend all undetermined personal actions, is a right given a debtor by the bankrupt act under the Constitution of the United States, and he is entitled to be protected in that right by this court.

But it is said that the motion for further security, which has been noticed by the creditor in the actions pending in the court of appeals, is not strictly a proceeding against the bankrupt. I think otherwise. It is just the proceeding which will compel the bankrupt to determine, pending his application for his discharge, whether to defend the suit or allow a final judgment. But the bankrupt act does not permit him to be forced to decide that question now. It declares that no

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such suit shall be allowed to proceed until he has had a reasonable time to obtain his discharge, if he can, and the mandate of the act to this court is to stay such a proceeding in whatever court it may be pending.

My opinion, therefore, is, that it is the clear duty of this court to maintain this injunction heretofore granted against the petitioners until the bankrupt shall have had a reasonable time to obtain his discharge. What effect the discharge, if obtained, will have upon the proceedings pending in the state courts, I do not undertake to decide.

The motion must be denied.

For the motion, *Owen, Nash & Gray*. Against, *Emerson & Goodrich*.

U. S. DISTRICT COURT, S. D. NEW YORK.

Bankrupt set forth in his schedules a debt due a creditor which was barred by the statute of limitations of the state in which both resided, and wherein the debt had been contracted. On the creditor seeking to examine the bankrupt, he objected.

Held, That the debt was provable in bankruptcy, unless it were shown to be barred throughout the United States; and that the creditor had a right to examine the bankrupt under section 26.

Semble, That under section 22, any creditor claimant may apply for the examination of the bankrupt, whether he shall have proved his debt or not; while under section 26, only creditors who have proved their debts may so apply.

In re JAMES T. RAY.

IN this case, upon the day appointed by the register, in the application of Wheeler, Madden & Clemesen, creditors, for the examination of the bankrupt and his wife, and other witnesses, under section 26 of the bankrupt act, the bankrupt objected to the examination, on the ground that the claim of those creditors was barred by the statute of limitations of the State of New York, and, in support of such objection, the bankrupt put in before the register an affidavit and plea, for the purpose of availing himself of the plea and defence of such statute. The facts were conceded by the cred-

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ditors to be correctly set forth in the affidavit. The affidavit, which is made by the bankrupt, states that the claim of the creditors was filed with the assignee, December 7, 1867, the assignee having been appointed September 12, 1867; that such claim was founded upon a note made by the bankrupt and another person, as copartners, dated at New York, May 1, 1860, for \$747.14, payable in eight months after date, and upon a balance of account against said copartnership amounting to \$1,197.38, for merchandise purchased by it from said creditors prior to October, 1860; that the debtors and the creditors were all of them citizens of, and all of them resided within, the State of New York at the time such indebtedness arose or was contracted, and have thence continued and now are citizens of, and residents within, said state; that the credit on said indebtedness expired, and the entire claim became due and payable, and so remained for more than six years before the filing of the original petition of the bankrupt herein; that any right or cause of action accruing thereon against said copartnership or said bankrupt did not accrue within six years next before the filing of said petition; that, by reason thereof, the said claim is barred by the statute of limitations of the State of New York; that the said note was made and delivered at New York, and was payable there, and the said merchandise was purchased there, and the claims of said creditors was contracted there; that, by reason of said matters, the bankrupt takes objection to all proceedings by said creditors, or on their behalf, in this matter, and makes the affidavit and interposes the plea of said statute for the purpose of availing himself of such objection and of said statute as a defence and bar to said claim, or its allowance as a claim against his estate, and as a bar to the right of said creditors to have such examination; and that the bankrupt has in no way or manner waived said objection. On the foregoing facts, and on the request of the parties, the register has certified to the district judge, for his opinion thereon, the following question: Has a creditor who has proved his debt, but whose debt is debarred by the statute of limitations of

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the State of New York, as set forth in said affidavit and plea, a right to examine the bankrupt under section 26 of the bankrupt act?

BLATCHFORD, J. At the request of the parties, made through the register, the court consented to receive written briefs on the question. A brief has been furnished on the part of the bankrupt, but none on the part of the creditors. The questions discussed on the part of the bankrupt are, whether the bankrupt is estopped from availing himself of the statute of limitations by reason of his having set forth the claim of the creditors in the schedule of creditors annexed to his petition: whether the bar created by the statute of New York cannot operate as a complete bar to the debt, unless it be also shown that the debt would be barred in all the states of the Union; and whether, this being a proceeding for the relief of the debtor, and the discharge he petitions for being a matter of concession and favor, he cannot interpose a technical defence or objection, or one that does not go to the equities between the parties.

It is argued, on the part of the bankrupt, that the placing by him of the debt upon the schedule to his petition is not a promise to pay the debt, or an admission of a willingness to pay it, or an admission that it is due, or an acknowledgment or recognition of its existence, or of an existing liability to pay it, from which a new promise may be inferred, the fact that the debt is named in a proceeding, the sole purpose of which is to obtain a discharge from all liability on the debt, being a circumstance calculated to repel the presumption of an intent or purpose to pay the debt; that, under the facts in regard to this debt, the creditors cannot claim the benefit of the statute of limitations of any other state than New York; and that the right to a discharge on complying with the law is a legal right. The question certified is treated by the argument on the part of the bankrupt as identical with the question whether the claim in this case is provable under the bankrupt act.

The 26th section provides, that the court may, on the application of "any creditor," require the bankrupt to submit

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to an examination upon, among other things, all debts claimed from him, and all matters concerning his property and estate. The 22d section provides, that the court may, on the application of "any creditor," "examine upon oath the bankrupt, or any person tendering, or who has made proof of claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake." Before a creditor can, under section 26, apply for an order to examine the bankrupt, he must prove his claim. The words, "any creditor," in that section, mean any creditor who has proved his claim. It is true, that the examination under that section may extend to an examination concerning the claim itself. But an examination of the bankrupt, when desired, in regard to a claim proved or sought to be proved, can take place under the 22d section; and the words, "any creditor," in the last clause of that section, must, from the language of the whole section, be held to mean not only a creditor who has proved his debt, but a creditor who has tendered proof of a debt which has not yet been allowed, so as to authorize the latter, as well as the former, to apply for an examination under the 22d section. The order for the examination in the present case is stated to have been made under the 26th section, and I must infer that it was not to be merely an examination in reference to the debt claimed by these creditors. As their debt had been proved, they had a right, under section 26, to apply for the order. The debt being proved, and the order being made, the creditors have a right to proceed with the examination. The 23d section requires the court to allow all debts duly proved. But, under the provision in the 22d section, before quoted, the court is required to reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake. The claim of these creditors must stand as proved until it is rejected, either as not having been duly proved or as having been founded in illegality or mistake. If the bankrupt de-

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sires to have the claim rejected for any such reason, he must apply to the court by petition, and a reference will be ordered under section 38, to take the examination provided for by section 22.

I might content myself with answering the question certified, by saying that a creditor who has proved his debt has a right to examine the bankrupt under section 26 of the act, although his * debt may appear to be barred under xlv the circumstances set forth in this case. But what is really desired by the parties is a decision whether the debt in his case is one which ought to be rejected as being barred by the statute of limitations of New York.

The bankrupt act is silent as to the operation of any statute of limitation. The 19th section provides, that "all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy," may be proved against his estate. This language is broad enough, on its face, to include all debts, no matter of how long standing. I have not met with any decision under any former bankrupt act of the United States on the question presented. But in England it has always been held, under the bankrupt law, that a debt which cannot be recovered in an action, against a plea of the statute of limitations, cannot be proved in bankruptcy. (1 *Ex parte Dewdney*, 15 Vesey, 479; *Re Clendening*, 9 Irish Eq. R. n. s. 287.) And in England a dividend paid on such a debt was ordered to be repaid. (*Ex parte Dewdney*, *ubi supra*.) The principle involved is, that the debtor is under no obligation to pay such a debt, and that, therefore, it cannot be said to be "due and payable." The rule in England continues to be the same, and the ground on which it is put by elementary writers is, that the bankrupt has no option as to defending or not defending a claim against his estate in bankruptcy, save through the action of the assignee, and the assignee is bound, in the interests of the body of creditors, to set up any legal defence which the bankrupt could have set up if he were not bankrupt. (1 Archibold's Law of Bankruptcy, by Griffith & Holmes, edition of 1867,

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p. 533 ; 2 Dorir & Macrae's Law and Practice in Bankruptcy, p. 787.) I think that is the proper rule, and that, under section 19 of the bankrupt act, no debt can be considered "due and payable" which is barred by limitation, and that a debt so barred cannot be proved in bankruptcy. Is the debt in the present case so barred? The Code of Procedure of New York provides (sections 74, 91), that a civil action on causes of action such as those in this case, can only be commenced within six years after the causes of action accrued, but that the objection that the action was not commenced within the time limited can only be taken by answer. The whole scope of the statute is one affecting the remedy merely, and not the contract. A complaint setting out a cause of action which appears to have accrued more than six years before the action was commenced, is not objectionable on its face or open to a demurrer. The defence of the limitation must be set up by answer. If it is not so set up, it is waived. Now, the distinction between a law which affects the rights and merits of a contract, and extinguishes it and makes it null and void as the result of a prescription or limitation, and a law which does no more than limit the time within which an action must be brought upon the contract in the courts of the country which enacts the law, is well settled. A law of the latter description is wholly confined to the country enacting it. A law of the former description may, under certain circumstances, so affect the contract and its construction as to be capable of being invoked as a bar to an action on it in another country. (*Huber v. Steiner*, 2 Bingham N. C., 202 ; Story . Conflict of Laws, sec. 582.)

The statute of limitations of New York goes exclusively to the remedy in the courts of New York, and could never be invoked as a bar to an action in another state on the contracts in question in this case. This principle is sought by the creditors in this case to be applied to their claim, and they insist, that, as they would have a right, notwithstanding anything found in the law of New York, to sue the bankrupt on their claim if they find him within the jurisdiction of another

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state, they ought not to be deprived of the privilege of proving their claim in bankruptcy under a law of the United States, whose operation is co-extensive with the limits of the United States, unless it is shown that the claim is barred throughout the limits of the United States. The English bankruptcy law is co-extensive as to territorial operation with the English statute of limitations. The bankrupt act of the United States operates in all the states as well as in New York. Under these circumstances, I think, that a debt, to be barred by limitation, so as not to be provable under the bankrupt act as not being "due and payable," must be shown to be so barred throughout the United States. I am the less reluctant to hold this view, because a contrary rule would have an effect which the counsel for the bankrupt in this case seems to have entirely overlooked. By section 32 of the bankrupt act, a discharge under it discharges the bankrupt from all debts and claims which are by the act made provable against his estate (except such as are excepted by section 33); and by section 34, it is declared, that the discharge shall, with such exception, release the bankrupt "from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy." If it be held that the debt in this case cannot be proved against the estate, it will not be discharged, and it will stand against the bankrupt. If he shall hereafter be sued on it in another state, the discharge in bankruptcy will be no defence to such suit, if it appears that, on a direct adjudication, the creditors were refused permission, by the court in bankruptcy to prove their claim, on the ground that it was not provable because it was barred by the statute of limitations of New York, and that statute will be no defence to such suit. The effect of applying, in this case, the views contended for on the part of the bankrupt, would be very disastrous to his interests. The schedules to his petition disclose the names of three hundred and twenty-four creditors, whose aggregate debts, as set forth therein, amount to over \$120,000. Of these creditors two hundred and thirty-five are set down as residing in the

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State of New York. Of the entire amount of debts some \$30,000 have been put into the shape of judgments. The rest appear to have been all of them past due for more than six years at the time the petition in bankruptcy was filed, and to be simple contract debts. The same rule that would exclude the debt in question here from being provable, would exclude others, probably the debts of all the two hundred and thirty-five creditors who reside in New York, possibly the debts of all the three hundred and twenty-four, except those in judgments. Thus the bankrupt would, by his discharge, secure a discharge from but a meagre fraction of his debts. In the present case, ten debts have been proved, amounting in the aggregate, including the debt in question here, which is proved at \$2,897.29, to be a little over \$13,500. These debts are all of them in the same category. They are simple contract debts, not in judgment, and were all of them due and payable more than six years before the filing of the petition in bankruptcy in this case. If they should be held to be not provable against the estate of the bankrupt because they were barred by the statute of limitations of the State of New York at the time such petition was filed, and yet should be held, under section 34 of the act, to be discharged by a discharge in this case, because they were in fact proved against the estate, and all the other unproved simple contract debts should be held not to be discharged because they were not proved, and because, having been due and payable for more than six years before the filing of said petition, they were not provable, the result would be that the debts in judgment, amounting to \$30,000, and the debts proved amounting to \$13,500 would be discharged, while the remainder of the debts, amounting to nearly \$80,000 would be unaffected by the discharge. This is certainly a result which the bankrupt cannot be supposed to be aiming at by his proceedings in bankruptcy, or by taking the objection that the debt in question here is not provable against his estate. And yet it is a result which must inevitably follow, if the views urged on his behalf are sound.

In re Charles A. Morford.

I do not think that any interpretation of the act ought to be admitted which can work out any such result, if any other interpretation is fairly to be deduced from its provisions. It is not to be presumed that a beneficent statute like this, which was designed to restore to the pursuits of trade and business, for the benefit of the whole country, energies which have been crippled by misfortune, is so hampered in its operation as not to extend to the discharging of a simple contract debt which has been past due for more than six years. The provision in section 19, that "all debts due and payable from the bankrupt" may be proved, is broad enough to include all debts, no matter how old, for the recovery of which, but for a discharge under the act, the bankrupt can be sued anywhere within the territory where the discharge will operate; and no provision is found in the act which destroys the provability of a debt because it is barred by the statute of limitations of one state.

These views dispose of the question presented in the certificate from the register, without the necessity of deciding on any of the other points raised. But I ought to say, that I am not satisfied, that the setting forth of a debt in a schedule to a voluntary petition in bankruptcy, can have the effect of destroying a bar which has come into operation in regard to the debt by virtue of a statute of limitations.

The clerk will certify this decision to the register, Henry Wilde Allen, Esq.

December 26, 1867.

* U. S. DISTRICT COURT, S. D. NEW YORK.

xlvi

The register may allow amendments, if uncontested, to bankrupt's schedules of property and liabilities.

The originals of amendments so allowed are to be filed with the clerk.

In re CHARLES A. MORFORD.

BLATCHFORD, J. In this case the petitioner has appealed to the register for leave to amend the schedules to his peti-

In re Charles A. Morford.

tion, and the register has denied the application, upon the grounds and for the reason that the power of ordering amendments to the schedules rests entirely with the court, and that only the judge can allow such amendments. The register has certified such questions to the court, and states the points on which the opinion of the court is desired to be thus :

1. Whether registers to whom causes in bankruptcy are referred by order of the court, may allow amendments to be made to schedules filed with them.

2. If the registers can allow such amendments, whether such amendments can be made directly before the registers, and certified copies thereof be filed with the clerk, or whether the original amendments, permitted to be made, should be filed with the clerk, and the register thereafter receive copies from the clerk, as in the case of the original petition and schedules ?

By section 4 of the bankrupt act, it is provided that every register duly appointed and qualified shall have power, and it shall be his duty to sit in chambers and dispatch there such part of the administrative business of the court, and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct. By Rule 5 of the General Orders in Bankruptcy, framed by the justices of the supreme court of the United States, in pursuance of the 10th section of the bankrupt act, it is provided that the register may conduct proceedings, in relation to the following matter, when uncontested, namely (among others), ordering amendments of any proceedings. Among the amendments so referred is unquestionably the amendment of a voluntary bankrupt's schedule of creditors and property ; for by section 26 of the act it is provided that a bankrupt shall be at liberty from time to time, upon oath, to amend and correct his schedule of creditors and property so that the same shall conform to the facts, and by Rule 7 of the General Orders in Bankruptcy before referred to, it is provided that the court may allow amendments to be made in the bankrupt's petition and sched-

In re James M. Palmer.

ules upon the application of the petitioner upon proper cause shown at any time prior to the discharge of the bankrupt. These provisions apply as well to a case where the petitioner has not been adjudged a bankrupt, as to a case where he has. For the purpose of allowing such amendments when they are uncontested, the register is the court, and has power to allow them on a direct application to him. Of course the coördinate power of allowing them, in like cases, also exists in the judge.

The original amendments permitted to be made should be filed with the clerk, and in making them the provisions of Rules 14 and 33 of the General Orders in Bankruptcy before referred to, should be observed. When they are so filed, the register will act on them in conformity with Rule 7 of said General Orders in Bankruptcy, and Rule 4 of the rules of this court in bankruptcy.

The clerk will make a certificate to the register in accordance with this decision.

U. S. DISTRICT COURT, S. D. NEW YORK.

A petition in bankruptcy filed in the Southern District against a debtor who resides and carries on business in the Northern District of New York, will be dismissed for want of jurisdiction.

In re JAMES M. PALMER.

MESSRS. GOODWIN & FAUROT, attorneys on behalf of certain creditors in New York city, filed a petition in bankruptcy in the district court for the Southern District of New York, against James M. Palmer, who resides and has carried on business at Canandaigua, in the Northern District of New York.

On the return of an order to show cause why a warrant should not issue before Judge Blatchford, on the 23d of July, the debtor's counsel raised the objection that the court in the Southern District had not jurisdiction.

In re Moses C. Smith.

The facts of residence being admitted, and argument had, his honor held that his court had no jurisdiction, and dismissed the proceedings.

The attorneys for petitioning creditors filed a petition here in order to have the question decided upon argument, there being a difference of opinion among the profession upon that point. They had, at the same time, filed a petition in the same case in the Northern District anticipating this decision.

July 5, 1867.

U. S. DISTRICT COURT, MASSACHUSETTS.

Application for change of district.

In re MOSES C. SMITH.

IN the United States district court, before Judge Lowell of Boston, a hearing was had on the petition of Moses C. Smith, bankrupt, to have the jurisdiction of his case transferred from said court to the district court of New Hampshire. It appeared that the petitioner, a resident of West Newbury, Mass., had been carrying on business, in Hampstead, New Hampshire, in company with Nathaniel C. Smith of that town, under the firm name of N. C. & M. C. Smith. The firm had failed; his partner had filed in the district court of New Hampshire, on the 20th of last June, a petition for adjudication in bankruptcy. The bankrupt act provides, that all cases under it shall be tried in the district where the partners reside, and, as in this case, each partner resides in a different state, the same case would have to be tried in two different courts. The petitioner, therefore, prayed that further proceedings be stayed, and the court of New Hampshire be allowed to have exclusive jurisdiction over the same. After hearing the argument of the counsel, Judge Lowell ordered that the proceedings be stayed until further orders.

July 30, 1867.

Anonymous.

U. S. DISTRICT COURT, N. D. NEW YORK.

Petition not to be filed because of illegible writing.

JUDGE HALL this morning refused to allow a petition to be filed, on account of the illegible manner in which it was written. The names of the petitioner and his attorney are suppressed for obvious reasons. The judge said : The clerk is directed not to file the foregoing petition, schedule, and inventory, or any other so illegible. Looking to the petition alone, without some knowledge or information other than that to be derived from the marks intended for letters, no one can certainly determine the name of the petitioner, or of the town or county of his residence, or the name of his attorneys ; and the names and residences of many of the creditors are so illegibly written, that from the schedules themselves no register could without further knowledge or information, determine with anything like reasonable certainty, the name or address to be inserted in the warrant directing the notices to such creditors to be served by mail. In addition to these defects a considerable proportion of the words really intended by the scrawls which disfigured the schedule and inventory, can be guessed at, but not read.

The 14th of the General Orders, promulgated by the justices of the supreme court of the United States, requires that all petitions and schedules filed therewith shall be printed or written *plainly*, and without abbreviation or interlineation, except when such abbreviation and interlineation may be for the purpose of reference ; and the utmost liberality that the district court can exercise, *under such order*, will fall far short of excusing the numerous and obvious defects in these papers. I think the register might properly have refused his certificate.

July 23, 1867.

Anonymous.

U. S. DISTRICT COURT, S. D. NEW YORK.

Serving of the warrant by the marshal.

THE district court of the Southern District of New York has decided upon an application made to it under the provision of section 6 of the act, that the words in the warrant (Form No. 6) "either by mail or personally," do not confer upon the marshal any discretion as to the manner of service ; but, on the other hand, it is the duty of the marshal to serve all by mail, unless directed in the warrant to serve personally certain parties therein specified by name ; and that it is competent for the registers, in their discretion, to strike out the word "either" and the words "or personally" from the warrant.

On the return of the warrant, at the first meeting of the creditors, let the creditors who wish to have a voice in choosing an assignee, appear a few minutes before the hour designated for the meeting, and make proof of their respective debts. The registers are furnished with blanks for this purpose, which conform in size and shape to the other papers, and which can readily be filled up and sworn to. It will be observed that it is the majority in number and amount, who, at or before the first meeting, prove their debts, that are entitled to choose their assignee. So that it would appear if but a single creditor attend such a meeting and prove his debts, he is entitled to name the assignee.

U. S. DISTRICT COURT, N. D. NEW YORK.

Petition not to be filed where name of judge is incorrect.

MR. CUTTING, on behalf of some counsel in New York, asked leave to present a petition in an involuntary case. It appeared, however, that the petition was addressed to the "Hon. *Nye* K. Hale, District Judge, &c.," and after some argument the permission to file was denied ; it being held that

In re William E. Townsend.

if the name of the judge were given at all it must be correct, and that it could not be stricken out as surplusage.

July 24, 1867.

* U. S. DISTRICT COURT, S. D. NEW YORK.

The certificate of the clerk that he has mailed notice to creditors on a certain day, is sufficient evidence to that effect.

It is the duty of the clerk to mail the notices.

In re WILLIAM E. TOWNSEND.

UNDER the provisions of Rule 25 of this honorable court, the undersigned, one of the registers thereof, submits the following case for instructions:

The meeting to show cause of the creditors of the above named bankrupt was duly fixed by an order bearing date December 2, 1867, for the 27th of December, 1867. The solicitor of the bankrupt now appears before me, and produces a notice served by the clerk, upon one of the creditors who has proved his debt, which recites that the said meeting of creditors will be holden on the 2d day of December, which notice is hereunto annexed. The solicitor now moves for another order fixing the time of said meeting at some future day, unless indeed the register shall be of opinion that the error in the notice could not operate to invalidate the bankrupt's discharge.

I decided that the clerk's certificate being in due form under the seal of the court, certifying that true copies of the notice annexed to said certificate (in which the day fixed for said meeting is correctly recited) "were duly mailed to each creditor," and must control my action, and was to me conclusive evidence of the statements contained therein, provided it was really the purpose and intent of the act that such notices should be served by the clerk, which, by the way, I have never been able to believe, and therefore at the request of the solicitor of the said bankrupt I submit the question to the decision of this honorable court.

In re George E. White & John E. May.

I may also notice the fact that although the certificate recites that the notices were mailed on the 17th, yet the post-mark on the back of the annexed notice bears date on the 20th.

I. T. WILLIAMS, *Register.*

BLATCHFORD, J. The certificate of the clerk to the effect stated, is sufficient evidence of what is stated. The notices are to be sent by the clerk. The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

December 27, 1867.

U. S. DISTRICT COURT, S. D. NEW YORK.

The assignee is required, by section 15 of the bankrupt act, to sell all the bankrupt's unincumbered estate, real and personal, which comes to his hands, on such terms as he thinks best for the creditor. General Order 21 regulates the sales.

In re GEORGE E. WHITE & JOHN E. MAY.

MATTHIAS BANTA, assignee of above bankrupts, makes oath that he has endeavored to collect the assets set forth in the schedule annexed to their petition, but without success, and that it is desirable that the said assets should be sold and the estate closed, and praying for an order to that effect.

BLATCHFORD J. No order is necessary.

By section 15 of the act, the assignee is required to sell all unincumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors.

General Order No. 21 regulates the sales.

Anonymous.

U. S. DISTRICT COURT, S. D. NEW YORK.

If the bankrupt does not apply for his discharge within three months from the date of adjudication, when there are no assets, the notice need say nothing about the second and third meetings of creditors.

THE following questions have been certified to and been decided by Judge Blatchford :

“ Suppose the second and third meetings of creditors have not been held, and *no assets* come into the hands of the assignee ; and that *after* the expiration of three months from the date of adjudication, the bankrupt applies for his discharge, need the notices make any mention of second and third meetings of creditors, or need there be any such ? ”

T. B. GATES, *Register*.

BLATCHFORD J. If the bankrupt does not apply for his discharge within three months from the date of his being adjudged a bankrupt, the notice need say nothing about the second or third meetings of creditors. These meetings will then be left to be regulated by the provisions of sections 27 and 28 of the act.

* U. S. DISTRICT COURT, S. D. NEW YORK.

All proofs of debt are to be sent to the assignee for him to report them as required by section 22 of the bankrupt act.

When the assignee has made his register, he must return the proofs of debt to the register, and they must, under General Order 27, be filed in the clerk's office with the other papers in the case.

SECTION 22 general clause 105, requires register to mail proof of claims to assignee.

General clause 109, next section : “ The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers.”

What is to be done with this list after it is made and cer-

In re John S. Perry.

tified; and if it is to be sent to assignee, need the proof of claims *also* be sent to him?

If *proof* of claims, depositions, are to be sent to assignee, what is he to do with them finally? Are not they to be annexed to and filed with other papers at end of case, and if so, how is register to get them. Some have notes and other evidence of debt attached, and unless the parties choose to have copies made as provided for by the act, these go into the hands of assignee with the proof of debts.

I would like to know what the practice is in these respects.

T. B. GATES, *Register*.

BLATCHFORD, J. All proofs of debt are, under section 22, to be sent to the assignee, for him to report them as required in section 22. The list to be made by the register under section 23 and section 27, is the list shown by Forms 32 and 33, and is a list for a dividend. That list is to be given to the assignee (see mem. at the end of Form No. 33). This list can be made from the register kept by the assignee under section 22.

When the assignee has made his register, he must return the proofs of debt to the register, and they must, under General Order No. 27, be filed in the clerk's office with the other papers in the case.

U. S. DISTRICT COURT, N. D. NEW YORK.

A bankrupt omitted the names of certain creditors from his schedules, for the reason that he supposed the statute of limitations was a bar to the debts due these creditors.

Held, That the debts in question should have been included in the schedules, and that those creditors were entitled to notices of the proceedings.

After the schedules are amended, a new warrant should issue, to be served on the creditors whose names have been introduced by the amendment.

The notices should contain the names of all the creditors; if these have been properly published under the original warrant, they need not be repeated.

When an assignee has been chosen by creditors under the first warrant, notice of the application to remove him should be given, so that all the creditors who have proved their debts may be heard in such application.

In re John S. Perry.

In re JOHN S. PERRY.

HALL, J. In this case of voluntary bankruptcy, the petition was filed on the 5th day of September last, and on the 10th day of September the petitioner was adjudged a bankrupt. The usual warrant was issued requiring notices of the first meeting of creditors, on the 28th day of that month, to be given by the marshal.

On the 25th day of the same month, an affidavit was presented showing that the names of certain creditors had been, by mistake, omitted in making up the schedule annexed to the original petition, but that their names, residences, &c., had been furnished to the marshal, so that notice of such warrant and meeting would be served on them; and an application was made upon such affidavit for an order allowing the proper amendment of such schedule. The order allowing such amendment was made, and on the 28th September the register, upon the failure of the creditors to choose an assignee, appointed an assignee of the bankrupt. This appointment was approved by the judge, and the assignee has made and filed his report.

The bankrupt now presents an affidavit showing that the names, &c., of some twenty other creditors, to whom he was indebted in considerable sums, amounting in the aggregate to more than \$200,000, were omitted from the schedules annexed to the original petition, by reason of the debtor's understanding, and belief, that the statute of limitations was a bar to the debts due to such creditors.

The omission is satisfactorily explained, and no doubt is entertained in regard to the propriety of allowing the proposed amendment. The debts, though perhaps barred by the statute of limitations of this state, might yet be enforced against the petitioner under the laws of another state, and they should have been embraced in the petitioner's schedule; and the parties, to whom those debts are due, are entitled to notice of the proceedings under the petition of the bankrupt. The only questions which require consideration are those re-

In re John S. Perry.

lating to the practice which should be adopted in this and similar cases, in order to secure to the creditors whose debts were not embraced in the original schedule, the rights to which they are entitled under the bankrupt act, and, as these questions may frequently arise, it is deemed proper (although the application in this case is not opposed) to indicate what practice should be pursued in similar cases.

Under the 26th section of the bankrupt act and the 5th and 33d General Orders, this application may be made to the register to whom the case stands referred ; and such register may allow and act upon the amendment when applied for and made as provided for in General Order No. 33.

The more difficult questions relate to the practice to be pursued after the amendments have been made.

After the best consideration I have been able to give these questions, I am inclined to think that when the amendments have been made, the register should issue a new warrant, briefly reciting the proceedings, and commanding the marshal to serve upon the creditors whose names have been introduced by the amendments, proper notice of a meeting of the bankrupt's creditors, to prove their debts, and to choose an assignee or assignees of his estate — substantially in the form required by the original warrant. These notices should include the names and residences of all the creditors, with the amount of their debts, &c., as in the first notices, and should be served in the same manner, and the same length of time before the day of meeting, as would have been proper if their names had been included in the original warrant. The newspaper notices, if they have been properly given under the original warrant, need not be repeated, nor need the creditors on whom the former notices were served be served with new notices unless such creditors appeared at the meetings held under the prior notice or have proved their debts.

At the meeting held under the notices required by the warrant issued upon these amendments, the creditors appearing may, if they choose, select an assignee, and may then

In re Jacob H. Mott & Jordan Mott.

apply to the district court to remove the assignee already appointed, and to appoint the person so chosen in his place.

In a case where an assignee has been chosen by creditors under the first warrant, or where creditors not voting at the second meeting have proved their debts, notice of the application to remove the assignee so chosen should be given to all creditors who have proved their debts, in order that they may be heard on such application.

The affidavit and proposed amendments will be returned to the petitioner, that he may make an application to the register to allow the amendments proposed.

* U. S. DISTRICT COURT, S. D. NEW YORK.

Where the general assignee of the bankrupt made certain conveyances of the real estate, the administrators of the grantee made application to have the amount paid on the contract of sale refunded, which was denied for the reasons that the contract of sale was not delivered up to be cancelled, and further that there was a failure to show that the transaction with decedent was made in good faith by the general assignee.

In re JACOB H. MOTT, a bankrupt under the act of 1841.

In re JORDAN MOTT, a bankrupt under the same act.

BLATCHFORD, J. When the questions in regard to the sales and transfers made to Isaac C. Delaplaine by the general assignee in bankruptcy in these cases were before the circuit court for this district in December, 1863, by adjournment from this court, Mr. Justice Nelson, in his opinion delivered in the matter, said that not only ought the orders of this court of the 28th of February, 1860, for the making of the sales in question, to be set aside, but the conveyances made under those orders by the general assignee to Delaplaine ought to be delivered up and cancelled, and the money paid by him and deposited in this court, amounting to \$800, ought to be refunded to him, and the money paid by him to the general assignee and not so deposited amounting to \$200,

In re Jacob H. Mott & Jordan Mott.

ought to be refunded to him by the general assignee, and that this court had power to make an order to that effect. Judge Betts, in disposing of the matter in this court on the decision by the circuit court of the questions adjourned into that court, delivered a written opinion in which, after deciding that the proceedings to obtain the orders of sales were irregular, and that the sales were void, and ought to be set aside, he said: "If the purchase made by Delaplaine from the general assignee was *bond fide*, and in the belief that the power exercised on the occasion was rightly and fairly used by the general assignee in his behalf, it is competent for the court, if necessary, to afford the said Delaplaine relief against the erroneous proceedings, by compelling the restoration to him of the consideration paid by him on such void sale."

It appears from the papers on file in these matters that on the 29th of February, 1860, the general assignee made conveyances to Delaplaine in pursuance of the sales, the conveyances being of interests of the bankrupts in certain real estate, and received from Delaplaine as the purchase money, \$800, being \$400 in each case, which sum of \$800 was paid into this court, and is still in court, and also received from Delaplaine \$200 for his "legal professional services" in the matters, which latter sum he has retained. It also appears from an affidavit made by Delaplaine on the 14th of December, 1860, that after his purchase from the general assignee, he employed a person by the name of Irving to ascertain the market value of the purchased property; that Irving had no authority to offer it for sale, but that having been informed by Irving of an offer he had made of it, he, Delaplaine, expressed his regret, but declared that as the offer had been made he would confirm what Irving had done. It also appears from the files of the court that Irving on the 14th of June, 1860, made a written offer on behalf of Delaplaine to sell for \$20,000 what had been conveyed to Delaplaine by the general assignee.

An order was made by this court on the 17th of June, 1864, in pursuance of the decision of Judge Betts, before referred to, decreeing that the sale to Delaplaine was void, and

In re Jacob H. Mott & Jordan Mott.

that the orders of sale be revoked and annulled, and that the general assignee proceed in the due course of the administration of the duties of his office, and dispose of the assets of the bankrupts in his hands, and distribute the same according to law. The order made no provision in regard to paying any money back to Delaplaine, probably for the reason that Delaplaine made no application to court for that purpose, and still adhered to his purchase, as evidenced by the fact that he did not offer to deliver up for the purpose of cancellation, the conveyances which had been made to him by the general assignee.

Delaplaine having died in July, 1866, his administrators now apply to this court by petition, praying for the refunding to them of the \$1,000. But they do not offer to deliver up to be cancelled the conveyances made by the general assignee to Delaplaine; nor do they show that Delaplaine never assumed to dispose of what purported to be conveyed to him; nor do they show that Delaplaine never realized anything from a sale of the interests, or what disposition he made of them; nor do they show, in accordance with a view taken by Judge Betts in his opinion, that the purchase made by Delaplaine was *bonâ fide*, and in the belief that the power exercised on the occasion was rightly and fairly used by the general assignee in his behalf. The purchase for \$800, with a fee of \$200 to the general assignee, of what the purchaser less than four months afterwards held for sale at \$20,000, would seem pretty conclusively to repel the idea that there could have been any *bona fides* in the transaction on the part of Delaplaine, or any belief on his part that the general assignee, in parting with the interests sold for \$800, was exercising in a right and fair manner the powers of his office, which required him to realize as much as possible for the creditors of the bankrupts.

The application, in the shape in which it is now made, is denied.

G. B. Goldsmith, for the petitioners.

In re William H. Hughes.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where a creditor appears and opposes the discharge of a bankrupt before the register, the register must make a certificate of his proceedings, stating such opposition, and return the papers into court in like manner as if there were no opposition.

An assignee must make his return under Form No. 35 when requested to do so by the bankrupt, when in fact he has neither received nor paid out any moneys, even though he may have reason to believe that he will thereafter receive money as the proceeds of assets of the estate.

The right and duties of assignees, and compensation for services, discussed.

In re WILLIAM H. HUGHES.

I, ISALAH T. WILLIAMS, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose, pertinent to said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Francis C. Nye, who appeared for the bankrupt, and Mr. A. M. Bigelow, who appeared as assignee of the said bankrupt.

The petition in this case was filed on the 19th day of July, 1867. The schedules set forth no assets. On the 13th of August, Mr. A. M. Bigelow was chosen assignee. On the 23d of November the bankrupt petitioned for his discharge. The order to show cause was made returnable December 23d, on which day the meetings were held pursuant to said order; and two creditors who have proved their debts appeared in opposition to the bankrupt's discharge, whereupon the bankrupt applied for the usual certificate of conformity, insisting that the case must then go before the court to hear the opposing creditors upon the question of a final discharge. This certificate the register was then unable to make for want of the return of the assignee. Application was thereupon made to the assignee for his certificate, that no assets had come to his hands. This the assignee felt unable to give, alleging that he had some reason to believe that a claim for a considerable amount was due from a party to the bankrupt, which had not been put into the schedule. He thereupon, on the

In re William H. Hughes.

23d day of December, obtained an order for the examination of the bankrupt before the register. On the 27th, the examination was proceeded with before the register and adjourned to the 30th of December; and when it was again about to be proceeded with, the * question arose as to which 10 of the parties, the assignee or bankrupt, was liable for the fees of the register, as well as the compensation to the assignee, for his services in procuring said examination, whereupon it was agreed that the question might be certified up to the court, and in the mean time the examination should continue to its close, whereupon it was so proceeded with to its close.

Thereupon the bankrupt demanded of the assignee his certificate (Form 35) which the assignee refused to give, insisting that the claim aforesaid is assets in his hands, which he is bound further to investigate and perhaps prosecute to collection.

These facts seem to raise three questions, as follows:

First. Where creditors appear at the last meeting, and oppose the bankrupt's discharge, shall the register make the certificate in the usual form, save that instead of saying that there was no opposition, say A. B. &c., appeared and opposed the discharge, and thereupon return the papers before him in the case to the court in all respects as if there were no opposition?

This would perhaps be the most convenient practice. The court can then under another order, if it see fit, refer the case back to the register, to take proof upon the allegations of the opposing creditors or otherwise, as might under the circumstances be proper.

Second. Must the assignee make his return, as per Form 35, in a case where in fact no assets have come to his hand, even though he have reason to believe that upon some claim in favor of the bankrupt he may thereafter obtain assets?

All that Form 35 requires the assignee to certify, is that he has neither received, nor paid, any money on account of the estate. It is a principle of law applicable alike to judicial

In re William H. Hughes.

and ministerial officers, that where by law they *may* do a thing, they must, if so required, do it. A judge has no more right to refuse to render a judgment, grant an order, or issue a process when a case is made from such judgment, order, or process, than a sheriff has to refuse to execute a process when delivered to him for that purpose. The functions of the assignee partake somewhat of the judicial and ministerial, and it cannot be pretended that he has any *caprice*, by which, under the much abused word *discretion*, he may refuse to give to the bankrupt at all times, when so required, his strict legal rights. The certificate in question in the present case would be strictly true in point of fact. The only question is, would it be true to the tenor and spirit of the act? I think it would. The bankrupt, under certain circumstances, may apply for his discharge in sixty days after he is declared a bankrupt. He must apply for his discharge within a year, or not at all. In the present case it would not be possible for the assignee to test the claim he refers to, in the courts of this city in a year. Besides, the assignee's office does not expire until all his duties are done. He is amenable to the order of the court at all times while he has assets in his hands, which may, and probably in many cases would be, for years. I cannot think he has a right to delay the bankrupt's discharge. But on the other hand he must at all times, when requested, make such certificate as the act requires and the facts permit of.

Third. In case the assignee shall examine the bankrupt before the register, and find no assets, and no assets come into his hands in the case, is the bankrupt bound to pay the fees of the register, and compensate the assignee for such examination?

I find nothing in the act or general orders that would compel him to do so. He is not the actor in such a proceeding, but is acted against. The act contemplates that the party applying for a service shall pay for it. Suppose the register were to refuse to go on with such an examination (as he may) until he is secured or paid his fees, and the bankrupt were to

In re William H. Hughes.

refuse so to pay the same, would the court feel at liberty to stay his proceedings in the case until he should comply with the demand of the assignee? Assignees chosen by the creditors (as almost all at present are) are universally, if not hostile to the bankrupt, at least in sympathy with, if not attorneys for some of the principal creditors, whose interests almost require them, if they cannot defeat, at least to delay the bankrupt's discharge. If the bankrupt is liable at one time to pay such expenses, he must be at another. The assignee's functions remain, perhaps for years after the bankrupt is discharged. May he always call up the bankrupt or other witnesses, and examine them touching some rumor of property fallen to the bankrupt, as heir or otherwise, to which, as assignee, he may be entitled, and if he fail in his search to obtain anything, can he call upon the bankrupt to reimburse him? Can he in advance in such a case compel the bankrupt to secure the register his fees?

I cannot avoid the conclusion that if the assignee sees fit to take such proceedings, he must look to the creditors, for whom and in whose interests he really acts, to reimburse him for his expenses as well as pay him for his services.

Respectfully submitted,

I. T. WILLIAMS, *Register*.

BLATCHFORD, J. In answer to the three questions certified in this case, the court replies:

First. Where, on the return of an order to show cause before a register why a bankrupt should not be discharged, a creditor appears and opposes the discharge, the register must make a certificate of his proceeding, stating his opposition, and return the papers into court in like manner as if there were no opposition.

Second. An assignee must make his return, when requested by the bankrupt, under Form No. 35, when he has in fact not received or paid any moneys on account of the estate, even though he may have reason to believe that he will thereafter receive moneys on account of the estate, as the proceeds of assets thereof.

In re William H. Hughes.

Third. Under the provisions of section 4 of the act, and General Order No. 29, where an assignee examines a bankrupt before a register, under section 26 of the act, the assignee must pay the fees of the register for such examination, whether he has any assets of the estate or not. If there are any assets, the court can, under Gen. Order No. 29, reimburse the assignee out of the assets. The bankrupt is not, under such circumstances, bound to pay the fees of the register. By the provisions of section 28, the assignee, if not in funds from the estate at any time, to a sufficient extent to defray the necessary expenses which will be required for the further execution of his trust, may require that the funds for that purpose shall be advanced or satisfactorily secured to him before he proceeds further. These funds must be advanced or secured by the party for whose benefit the expenses are to be incurred. If they are to be incurred in an examination of the bankrupt, under section 26, with a view to discover assets for the benefit of his creditors, they must be advanced or secured by the creditors. If they are to be incurred in a proceeding by the assignee, which is a part of the proper steps preliminary to the discharge of the bankrupt, they must be advanced or secured by the bankrupt. The "expenses," thus provided for by section 28, do not cover any allowance to the assignee for his services. Section 28 does not provide for any allowance for such services, except by way of percentage upon moneys received and paid out by the assignee as assets of the estate. But, by section 17, the assignee is to be allowed a reasonable compensation for his services, in the discretion of the court; and, if there is any money in his hands, this compensation and all the necessary disbursements made by him in the discharge of his duty, may be retained by him out of such money. This allowance cannot be made until after the services are rendered, because, until the court is advised what the services have been, it cannot determine whether any particular amount of compensation for the services is or is not reasonable, unless perhaps it might, for specific acts, mainly of routine, prescribe specific fees. If there is no money in

In re John T. Drummond.

the hands of the assignee, the payment of the compensation referred to in section 17, if it is a compensation for services in steps properly preliminary to the discharge of the bankrupt, can, when the compensation has been allowed, be secured by a withholding by the court of the discharge of the bankrupt, until he makes the payment, on the ground that until then he has not in all things conformed to his duty under the act; and, if it is a compensation for services for which the bankrupt ought not to pay, its payment to the assignee can probably be secured by appropriate means. Compensation to the assignee for his services in an examination of the bankrupt under section 26, with a view to discover assets for the benefit of his creditors, is not to be paid by the bankrupt.

The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

January 8, 1868.

U. S. DISTRICT COURT, INDIANA.

Every failing debtor who gives a preference to a part of his creditors, thereby commits an act of bankruptcy, and a judgment that he is a bankrupt must follow.

When two distinct matters, each of which contains a good cause of action or defence are alleged conjunctively, it is enough if either of them be satisfactorily proved.

In re JOHN T. DRUMMOND.

ON the 19th of July last, several mercantile firms in Cincinnati filed in this court a petition against John T. Drummond, charging that, on the 20th of March last, he committed several acts of bankruptcy, and praying that he be declared a bankrupt. They claim that they are creditors to the aggregate amount of \$2,784.36.

The acts of bankruptcy specified are as follows:

1. That on the 20th of March, 1867, at St. Paul, in Indiana, Drummond, being possessed of * certain 11-16 estate, property, rights, and credits, including a stock of merchandise, transferred and sold the same and all his

In re John T. Drummond.

other property to one James Trimble and John Read, with intent to hinder, delay, and defraud his creditors.

2. That said Drummond, on the day aforesaid, in contemplation of insolvency, sold the said property to said Trimble & Read, to whom he was indebted, and did afterward pay and assign certain notes, and accounts, to other of his creditors, with intent to defeat, and delay, the operation of the bankrupt act, and to give a preference to said creditors.

Drummond has filed a plea denying all the charges, and the parties have by agreement submitted the issue thus made for trial to the court without a jury.

The evidence is substantially as follows :

That on the 20th of March last, the petitioners were and still are, creditors of Drummond, as alleged in the petition.

That for more than a year past, Drummond has been, and now is, a resident of St. Paul, in Shelby County, Indiana.

That in May, 1866, said Trimble & Read, then, and still residents of St. Paul, were the owners of a store of country merchandise in that town, and then and there sold the same to Drummond for several thousand dollars, and in part payment received from him a conveyance of 200 acres of land at the price of \$1,000, the residue of the price of the goods, to wit : \$1,500 remaining unpaid till the 20th of March last, on which day, Drummond finding, as he swears, that he could not carry on his business and pay his debts, proposed to Trimble & Read to sell his store to them in payment of his debt to them, and in order to pay his other debts which he had in the mean time contracted with merchants at Cincinnati to keep up his stock of goods.

That Trimble & Read assented to this proposition ; and it was agreed between them that the goods should be invoiced, and taken by Trimble & Read at wholesale Cincinnati prices ; that they should take back said land at \$1,000, and that they should pay for the whole by relinquishing their said debt of \$1,500, and by paying for the residue in cash on a credit.

That in pursuance of this arrangement, the parties pro-

In re John T. Drummond.

ceeded to inventory the goods, which employed them two or three days; and, in the mean time, several of Drummond's other creditors, hearing of these proceedings, came to St. Paul, and found the parties invoicing the goods, and declared to them that, unless their respective claims were secured, they would proceed to law to attach the goods; whereupon an arrangement with these creditors was made, by which Trimble & Read, after satisfying their own debt, should pay the balance of the price of the goods and land to these importunate creditors — and to the creditors Drummond also assigned book accounts to the amount of \$1,500 to secure them.

That, upon this arrangement, the invoicing proceeded, and when it amounted to \$4,000 it was agreed that the residue — a parcel of unsaleable goods — should be taken by Trimble & Read in a lump at \$575.

The evidence proves that this arrangement swallowed up all the property of Drummond; and that the petitioners and other absent creditors, whose debts amount in the aggregate to more than \$3,000, were left without any means of paying them.

It is proved that the goods, accounts, and land thus disposed of included all the property owned by Drummond; and were worth about \$6,000, and that Drummond's debts then amounted to about \$8,000.

Drummond swears that at the time of these transactions, he had made no estimate of the amount, either of his debts or his assets; that, in thus transferring his property, he had no intent to defraud, hinder, or delay any of his creditors; that, up to the time when said invoice had been made to the amount of \$4,000, he supposed that he had enough property to pay all his debts; that in this, however, he discovered he was mistaken as soon as the invoicing had reached \$4,000; and notwithstanding said discovery he afterwards proceeded to consummate said arrangement with Trimble & Read, and other creditors.

The evidence also shows that all the debts of Drummond were due at the time of these transactions.

In re John T. Drummond.

Does this evidence establish any of the acts of bankruptcy charged in the petition?

MCDONALD, J. Those provisions of the bankrupt act, which relate to the points under consideration, are found in the 39th section, and declare that every person who shall "make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, with intent to delay, defraud, or hinder his creditors," shall be deemed to have committed an act of bankruptcy; and that every person, "being a bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, who shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, with intent to give a preference to one or more of his creditors, or with intent, by such disposition of his property, to defeat or delay the operation of the bankrupt act, shall be deemed to have committed an act of bankruptcy.

The counsel for Drummond have contended that, to make him a bankrupt under any of these provisions, the wrongful intent must exist on the part of the persons receiving his property, as well as on the part of Drummond. This is undoubtedly the rule in cases arising under the statutes against the fraudulent conveyances. And it may be the rule under the 35th and 39th sections of the bankrupt act in a suit by an assignee against a preferred creditor. But it is clearly not the rule in the case on trial. Here we look only to the interest of the party charged with an act of bankruptcy. If he intends, by his act, to delay, hinder, or defraud his creditors, or to give a preference to any of them, or to defeat or delay the operation of the bankrupt act, he clearly commits an act of bankruptcy, however innocent the intent of the preferred creditor, or the person to whom the transfer is made.

The petition first charges that Drummond transferred his property with intent to delay, hinder, and defraud his creditors. Is this charge proved? Is it proved that such an intent existed in his mind when he made the transfer to Trimble & Read? I construe the intent under consideration to mean an actual design in the mind. Drummond positively

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swears that he had no such intent. And there is nothing in the evidence that leads me to conclude that he swears falsely. I hold, therefore, that the first charge of bankruptcy is not proved as alleged in the petition.

The second charge of bankruptcy set out in the petition is that Drummond, in contemplation of insolvency, transferred, by way of payment to certain creditors, his property with intent to defeat and to delay the operation of the bankrupt act, and to give a preference to said creditors. This averment really contains a charge of two acts of bankruptcy — the intent to defeat and delay the operation of the bankrupt act, and the intent to prefer some of his creditors. The counsel for Drummond have argued that, in order to success, the petitioners must prove both these. In this I think they are mistaken. It is never good pleading to make averment in the alternative, nor is it sufficient evidence to prove that either one or the other of the two propositions is true, but leaving it uncertain which of them is true. But when two distinct matters, each of which contains a good cause of action or defence, are alleged conjunctively, it is enough that either of them be satisfactorily proved.

As to the charge that Drummond disposed of his property with intent to defeat and delay the operation of the bankrupt act, the same reason seems to apply as we have applied to the first act of bankruptcy charged in the petition. I do not think that, in the transactions above detailed, it is sufficiently proved that Drummond intended to defeat and delay the operation of the bankrupt act. Rather, I think from evidence, that he had no thought at all concerning that law, as it had only been passed eighteen days before — had not then been published, and even lawyers were ignorant of its provisions.

As to the charge that Drummond transferred all his property to some of his creditors with intent to give them a preference over his other creditors, I do not see how he can escape it. It appears, indeed, that no intent to prefer any creditor existed in his mind at any time before the inventory

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already mentioned amounted to \$4,000. For up to that time he supposed he had enough assets to pay all his debts, and he seems to have intended to pay them all out of those assets. But he himself swears that, when the invoicing reached that amount, he perceived that his property was not sufficient to satisfy his creditors. At that moment he was an insolvent man; and he then clearly saw it and knew it. At that time his arrangement with Trimble & Read was incomplete. No delivery of any property had been as yet made to them. They had paid him nothing on the contract; they had executed no writing in relation to it, and it clearly had not proceeded to such a consummation as to make it binding on anybody. The *locus pœnitentiæ* then existed, and he had at that moment a perfect right in law to drop the whole matter, and refuse to carry out his arrangement with Trimble & Read. Had he done so, it is plain that they could have maintained no action, on it, against him. But, with this knowledge of his insolvency, he proceeded to transfer all his property for the benefit of a portion of his creditors, then well knowing that he was thereby giving them a preference, and that he had not a dollar left to apply to the debts due by him to the petitioners.

Now, it is a rule that every sane man is presumed to intend the probable consequence of his voluntary act. The consequences of this transfer by Drummond of all his property to a portion of his creditors, were not only that it would probably give them a preference, but that it would necessarily and certainly produce that effect. He must have known that this consequence would follow that act; and he must, therefore, be conclusively presumed to have intended it. In so doing he committed an act of bankruptcy, and a judgment that he is a bankrupt must follow.

It is due to the parties concerned to say that I see that no moral turpitude in this matter on the part of any of them. Under the law, as it stood before the bankrupt act took effect, a debtor had a right to prefer a portion of his creditors, and the most diligent creditor generally obtained the prefer-

In re Graves.

ence. The equity maxim was *Vigilantibus, et non dormientibus, jura subveniunt*. But the bankrupt act abolished this rule; and now every falling debtor, who gives a preference to a part of his creditors, thereby commits an act of bankruptcy; and the bankrupt law will not allow the preference. But our bankrupt act took effect March 2, 1867. The transactions under consideration occurred only eighteen days afterwards, and, though every man is bound at his peril to know the law, yet as this act was not published till several months afterwards, it is probable that these parties were not in fact aware that they were violating its provisions.

It is proper, also, to say that I give no opinion touching the liability of any of the preferred creditors in case of a suit against them by the assignee in bankruptcy who may be appointed in this case. Whether they are bound to bring into the general fund of the bankrupt's estate, the amount which they have received from Drummond, must depend, to some extent at least, on other considerations and other evidence not relevant to the present adjudication. And indeed as the preferred creditors are not parties to this proceeding, it would be unjust that the present decision should in any manner affect their interest except so far as it fixes the *status* of Drummond as a bankrupt.

* U. S. DISTRICT COURT, S. D. NEW YORK.

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An assignee desiring to sell property as perishable, or because the title is in dispute, must apply to the court by petition, and not to a register.

In re GRAVES.

I, ISAIAH T. WILLIAMS, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Messrs. Sanford, La Baron & Porter, who appeared for the bankrupt, and Mr. Albert Smith the assignee of the said bankrupt.

In re Graves.

The bankrupt had, shortly before the filing of his petition, purchased a quantity of carpets. The vendor conceiving that they had been bought with the fraudulent intent not to pay for them, brought replevin for them, and the sheriff took possession of the goods. The bankrupt immediately bonded them back under the provisions of the Code, and they thereupon came into the hands of the assignee.

The suit is now pending, the assignee claiming now, as the bankrupt before claimed, the goods. Of course the event of the suit is uncertain, and the sureties in the bond so given by the bankrupt to procure the return of the goods, now claim that they should be protected, so far as protection is possible against loss in case of an adverse termination of the case.

The parties appear before me and ask that the goods be held by the assignee to abide the result of the action, or that they be delivered over to the plaintiff in the action, and the bond of the sureties to be cancelled, or for such other relief in the premises as to the court may seem fit. I am arrested *in limine* by a question of jurisdiction, whether the party should not apply to the court, and not to a register. The concluding paragraph of section 17 of the act gives the assignee full power to deal with a matter of this kind, "under the direction of the court." Does the word court here mean *register*, as in many other cases? I am not willing without first referring the matter to the court, to assume that it does. If your honor is of opinion that it does, I shall have no difficulty in properly disposing of the case. If not, the parties must make their application directly to the court.

I think section 25 should also be construed in the same connection, and if your honor will consider both these sections, and determine what, if any of the duties in these two sections referred to devolve upon the register, it will be of much aid to us in the discharge of our duties.

I think I may safely say that scarcely an hour of the day passes, in which at least one assignee does not apply to me to know what in a given case he ought to do. Doubting my jurisdiction touching such matters, I have the honor to apply

In re P. & H. Lewis.

to the court for instructions in the premises, as I may do under the 25th Rule of this honorable court.

I. T. WILLIAMS, *Register.*

BLATCHFORD, J. If an assignee desires to settle a controversy under section 17, or to have property sold as perishable, or because the title to it is in dispute under section 25, he must apply to the court by petition, and not to a register. If on the presentation of the petition, on notice to any party interested, it shall appear that the matter is uncontested, the court can under section 4 refer it to the register, with power to dispose of it.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where one of two partners files a petition in the name of the firm, setting forth the fact that the other partners had already filed a petition in bankruptcy, an order may be granted that he have leave to join in the proceedings heretofore taken; but proceedings in regard to his individual creditors will take place under the second petition. Thus, such partner will receive a discharge under his own petition, and so far as the second petition is a petition for an adjudication of the firm, it may be disregarded except as indicating assent to join in the first petition.

In re P. & H. LEWIS.

BLATCHFORD, J. In this case the register, on the 18th of November, 1867 (on a petition filed by Henry Lewis individually, and as a copartner of the firm of P. & H. Lewis, on the 13th of November, 1867), adjudged Henry Lewis individually and as a copartner of the firm of P. & H. Lewis, and also the said firm of P. & H. Lewis, bankrupt. The petition was not joined in by Philip Lewis, who with Henry Lewis composed the firm, nor did Philip Lewis assent to having the firm declared bankrupt. This action of the register was erroneous. General Order No. 18 prescribes the proper practice in such a case. Where a petition is filed to have a firm declared bankrupt, if all the members of the firm do not

In re P. & H. Lewis.

join in, or assent to, the petition, notice of its filing must be given to such of its members as do not join in it, or assent to it, in like manner as if the proceeding were on an involuntary bankruptcy against the members of the firm. Until this is done the register has no authority to make an adjudication in regard to the bankruptcy of the firm.

Philip Lewis now presents to the court a voluntary petition under the bankrupt act, which prays that he and Henry Lewis may be adjudged bankrupts and be discharged from their debts. The petition sets forth the copartnership, and the fact of the filing of a petition in bankruptcy by Henry Lewis, and is in other respects in form, a copartnership petition according to Form 2. The petition refers to schedules annexed to it as being schedules of the debts and assets of the copartnership, and of the debts and assets of Philip Lewis individually. Philip Lewis asks, on filing this petition, for an order that he have leave to join in the proceedings so heretofore taken by Henry Lewis, and his petition states that he is desirous of uniting in the petition of Henry Lewis, and of being made a party to the proceedings thereunder.

So far as this petition of Philip Lewis expresses his assent to have the firm declared bankrupt and his desire to join in the petition of Henry Lewis, Philip Lewis may properly be regarded as joining in the petition of Henry Lewis, to have the firm declared bankrupt, so as to effect a compliance with General Order No. 18, and thus validate the adjudication of bankruptcy in respect to the firm. But it is not in any other respect necessary for Philip Lewis to join in the proceedings taken by Henry Lewis, or to be made a party to them. The proceedings in respect to the firm, and the creditors of Henry Lewis individually, will take place under the petition of Henry Lewis. The proceedings in regard to the creditors of Philip Lewis individually will take place under his petition.

Philip Lewis will be adjudged a bankrupt, and receive a discharge under his own petition. Henry Lewis will receive a discharge under his own petition. So far as the petition of Philip Lewis is a petition for an adjudication of the bank-

In re Glaser.

ruptcy of the firm, it may be disregarded, except as indicating the assent of Philip Lewis to join in the petition of Henry Lewis for an adjudication of the bankruptcy of the firm. Under such circumstances General Order No. 16 will not apply to the case, as there will be but one petition for an adjudication of the bankruptcy of the firm.

The petition of Philip Lewis will be referred to the same register who has charge of the case of Henry Lewis.

Benedict & Boardman, for the petitioner.

U. S. DISTRICT COURT, S. D. NEW YORK.

Affidavit to stay proceedings in state courts.

In re GLASER.

SIEGMUND SPINGARN being duly sworn says, he is one of the copartners of the firm of Morrison, Lauterbach & Spingarn, attorneys at law. That Henry Morrison, one of the said firm, is the attorney of record of the said Louis Glaser, the petitioner for adjudication of bankruptcy. That the petition of the said Louis Glaser was filed on the 13th day of January, 1868, by this deponent. That before the filing of said petition, several creditors of the said Louis Glaser commenced actions for the recovery of money due and owing to them from said Louis Glaser. That on the 9th day of January, 1868, one L. H. Mandlebaum commenced an action in the second district court of the city of New York, which action is now at issue and placed for trial.

That on the same day a creditor named James Cohen commenced an action in the same court against the said Louis Glaser, the summons in which case is returnable on the 15th day of January, 1868. That on the same day George C. Eyland commenced an action in the marine court of the city of New York, against the said Louis Glaser, which action is now pending. That on the same day the firm of A. Altmayer & Co. commenced an action in the same court, to

In re Camp.

wit, the marine court, in which action the summons is returnable January 17, 1868.

That on the 10th day of January, 1868, Isaac Van Deusen, John Van Deusen, and Henry Boehmer commenced an action in the supreme court of the State of New York, against the said Louis Glaser.

18-24 * Deponent further says, that the petitioner, Louis Glaser, has no valid and legal defence to interpose in any of these cases, and that they will recover judgment, unless restrained by order of this honorable court.

Deponent further says that all these actions are brought to recover debts due by the said petitioner, Louis Glaser, which are set out in the schedule attached to the petition for adjudication of bankruptcy. That they are all debts provable under the act of congress passed March 2, 1867, and from which the petitioner may be discharged in bankruptcy.

SIEG. SPINGARN.

Sworn to before me, this 14th day of January, 1868.

R. E. STILWELL, *U. S. Commissioner.*

U. S. DISTRICT COURT, S. D. NEW YORK.

Injunction to restrain bankrupt and other parties from disposing of the bankrupt's property until the further order of the court.

In re CAMP.

UPON filing proof sustaining the allegations of the petition aforesaid, it appearing to the court that a proper case exists, and on motion of Charles H. Smith, attorney for the petitioners, ordered that an injunction issue out and under the seal of this court to be directed to William A. Camp, his counsellors, attorneys, solicitors, and agents, and to Henry Welsh, Bernard Costello, and John W. Thorpe, reciting the order to show cause, granted herein, and enjoining them until the further order of this court, from making any transfer or disposition of any of the property of the said Camp, not excepted by the bankrupt act, from the operation thereof, and

In re J. Ogden Smith.

from any interference therewith ; and in particular restraining the said Welsh, Costello, and Thorpe from proceeding to take possession or dispose of the property mentioned in the chattel mortgage set forth in said petition, and from all interference therewith until the further order of this court.

Witness the Honorable Samuel Blatchford, judge of the said court and the seal thereof, at the city of New York, in said district, this 15th day of January, A. D. 1868.

[L. S.]

GEO. F. BETTS, *Clerk.*

• U. S. DISTRICT COURT, S. D. NEW YORK.

Any attempt of a register to influence the choice of an assignee, is unauthorized and improper. Proof of a claim may be postponed until after choice of an assignee.

In re J. OGDEN SMITH.

MR. G. DE FOREST LORD moved to show cause why this case should not be removed from the hands of Mr. John Fitch, one of the registers in bankruptcy, at present having charge of the matter, and sent to some other register. Mr. Lord, in support of the motion, read several affidavits setting forth the gravamen of the complaint against the register ; that Mr. Fitch, to whom the case of John Ogden Smith, a bankrupt, was referred, improperly sought by misrepresentation to get one Isaac M. Andruss appointed assignee for the estate of the bankrupt. Mr. Lord, as counsel for one of the creditors, the firm of Halleck & Robbins, having read the affidavits of several creditors and counsel of creditors of the estate of the bankrupt, was followed by the defendant, Mr. Fitch, who read counter affidavits of persons who denied the representations of Mr. Lord as set forth in his affidavits, both as to occurrences and dates.

Mr. Lord then proceeded to address the court. He said it was important that the bankrupt act should be free from all abuse, and that the register should not descend from the bench to take part in the contests going on between the

In re J. Ogden Smith.

creditors and the bankrupt. It was desirable that a register should have no ends to serve, no axe to grind, no friends to push forward. He (Mr. Lord) would expect that from every register before whom he appeared. There was danger from the appointment of bad assignees, and good would come from the appointment of good assignees. The assignee was to take the place of the bankrupt himself, to take charge of the property, to deal with all claims against the estate, and make the most of it for the benefit of all the creditors. It depended on the fidelity of the assignee whether there should be a dividend at all, or whether it should be large or small. This was the essence of the bankrupt act, and it was all important. The choice of an assignee should be left to the unbiased choice of the creditors. Any interference by the register with the appointment of an assignee was a gross prostitution of his official position, and was introducing into the bankrupt act a practice full of evil and danger. He stated in strong language that this was exactly the case he had to complain of in regard to Mr. Fitch, who, he said, had solicited all the creditors who had proved their debts to vote for Mr. Andruss as assignee. He therefore asked the court to send this case before some other register, who would not have some friend to push forward as assignee. He might have adopted another course by going to Mr. Fitch, and telling him he intended to remove the case to another register if he did not cease his interference with the assignee. But the court could see that if he had adopted that course he (Mr. Lord) would have stood in the position of one who had thwarted Mr. Fitch in the carrying out of a cherished purpose. He (Mr. Lord) complained that in the presence of his friends, and among many of the members with whom he was accustomed to practice, Mr. Fitch had put an indignity upon him and done him all the harm he could, and therefore he wished that this case should be taken from the hands of Mr. Fitch.

Mr. Fitch replied that he had no personal feeling against Mr. Lord, whom he did not know at the time he came before him to be the son of Hon. Daniel Lord. But he did

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complain that Mr. Lord had attempted to get his own assignee appointed, and he would always fail to get him (Mr. Fitch) to swerve from the due and faithful discharge of his duties. He would always treat every person and every creditor who came before him with courtesy. He did not reprimand Mr. Lord because he had applied to his honor to show cause, but because he (Mr. Lord) had applied to him to get his own assignee appointed in the interest of his own clients.

Mr. Lord remarked that the statement of Mr. Fitch that he had applied for the appointment of an assignee was entirely false. He (Mr. Lord) had never mentioned the subject at all until it was brought to his notice by Mr. Fitch mentioning to him the name of Mr. Andruss.

Mr. Parsons said that, representing creditors as he did, he wished to state that they had no objection to leave the case in the hands of Mr. Fitch. They were sure they would get justice at his hands, and that was all they wanted.

Mr. Courson, representing creditors to the amount of \$4,000, said that in order to have the proper notice given to creditors, it would be necessary to have an early decision in the matter.

BLATCHFORD, J. This is a case of involuntary bankruptcy in which an adjudication of bankruptcy was made by the court on the 17th of December, 1867. The order of adjudication referred the case to one of the registers in bankruptcy of the court, by name, to take such proceedings thereon as are required by the act. On the same day a warrant was issued which appointed the 15th day of January, 1868, at the office of such register, as the day for the meeting of the creditors of the bankrupt to prove their debts and choose one or more assignees of his estate. An application is now made to the court on the part of Hallett & Robbins, creditors of the bankrupt, who have proved their debt against his estate, to vacate so much of the order of adjudication as refers the case to the register designated in the order, and to refer it to some other register without prejudice to proceedings already had in the case. The ground on which this

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application is based is, that the register has improperly interfered in the matter of the choice of an assignee of the estate of the bankrupt. Uncontradicted testimony shows that, on several occasions, on several different days, from two to five days prior to the day appointed for the first meeting of creditors and for the choice of an assignee, when creditors attended in person at the office of the register for the purpose of making oath before him to their proofs of debt, he presented, or caused to be presented, to them, a printed blank of Form No. 15, with the name of a person inserted in it as assignee of the bankrupt's estate, and requested them, either directly or through a clerk in his office, to sign such blank form, and vote for such person as assignee. It does not appear that such person was known to or of by any of such creditors, and it does appear that several of them did not know him or know of him. The register's reply to these allegations consists in a vindication of his motives in soliciting votes for the assignee, and in testimony as to the fitness of the person designated, and in attacks upon the character and motives of the attorney for Hallett & Robbins, who are also the petitioning creditors.

Whatever were the motives of the register, and however well fitted for the position the assignee of his choice was, his interference in the matter, in the manner stated, was wholly unwarrantable and improper.

The register is a part of the court, his duties are of a judicial character, and his action should, under all circumstances, be free from reproach, and above all suspicion of interest or partisanship. The fourth section of the bankruptcy act provides that "no register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy, in either the circuit or district court of his district, nor in an appeal therefrom, nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy, nor be interested in the fees or emoluments arising from either of said trusts." This provision indicates the spirit of judicial impartiality which the law ex-

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pects will be exhibited by every register in the discharge of his important duties.

With the choice of an assignee by the creditors he has nothing to do, except to preside at the meeting at which the choice is made. It is not necessary he * should ap- 26
prove or confirm the choice; for, although such an approval by the register is appended to Form No. 15, nothing of the kind is required by the statute. The selection is subject to the approval of the judge; and although it is the duty of the register, in transmitting the result of an election to the judge, for his action thereon, to make known any objection which exists to an approval of the choice, yet, beyond this, the register has nothing to do with either the election or appointment of an assignee, unless there is a failure to choose or a non-acceptance by the person chosen, and then, in certain cases, the register can appoint an assignee. In regard to the choice of an assignee, the policy of the bankrupt act, as clearly shown in its provisions, is, to give to the creditors of a bankrupt the free, deliberate, unbiassed choice, in the first instance, of the person who is to take the assets and manage them. This is a feature which did not exist in any former bankrupt law of the United States, and was adopted from the English system. The importance of this policy has been uniformly recognized by this court, and it has not failed to approve all elections of assignees by creditors, unless something was placed before it to show that the choice was not a proper one. It is especially incumbent upon registers in no manner to interfere with, or influence, either directly or indirectly, the choice of an assignee by creditors. The action of a register should, in all things, be that of strict impartiality, not only in fact but in appearance, and he should not present the semblance of having any interest or bias in favor of or against any particular person as assignee, any more than of being prejudiced for or against the bankrupt or for or against any creditor, in any proceeding. Any other course will lead, if not to abuses, to the suspicion of them, and will impair the usefulness of the registers and derange the harmonious working of the system.

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It might not be proper, in this case, to apply the remedy asked for, of transferring the case to another register, were it not that it is manifest, from the affidavits in the matter, and from what transpired in open court, on the argument of the motion, that it will be a judicious exercise of discretion to send the case to another register. This I do without at all meaning to question the motives of the register in soliciting votes for the assignee designated by him. I do it because the creditors who have made affidavits in support of this motion, and the attorney for the petitioning creditors, ought not to be compelled by the court, after all that has transpired, to continue the proceedings in this case before the register to whom it was referred.

Some animadversion was made by the register upon the fact that the attorney for the petitioning creditors served upon him, on the 10th of January, 1868, a notice stating that such creditors protested against the proof of any claims against the estate by four several creditors, naming them, and opposed their claims on the ground that they were not entitled either to prove their debts or to vote for or be eligible as assignees, and requesting that such attorney might be immediately notified if any of such persons should tender their claims for proof. This notice was served in the exercise of an undoubted right. Section 23 of the act provides, that "when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity, or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen." Rule 6 of this court gives to the register the same power of postponing the proof of a claim. The last clause of section 22 of the act provides for the mode of investigating a claim with a view to its rejection, if it shall be shown to be founded in fraud, illegality, or mistake. The notice in question served on the register seems to have been a proper notice preliminary to the exhibition to the register of grounds for the exercise of his power of postponement in regard to the claims specified.

Jan. 1868.

In re John W. Dean.

U. S. DISTRICT COURT, KENTUCKY.

Decision as to the fees of registers, clerks, marshals, and assignees, deciding what are legal and what unwarranted and improper.

In re JOHN W. DEAN.

BALLARD, J. In obedience to the order of court made herein, the register has made a taxation of the costs of all the officers of the court, including the assignee, and the bankrupt having filed exceptions to this taxation, the case is now before me on these exceptions.

As the case presents many questions of interest common to all the officers in the state who are engaged in the administration of the bankrupt act, I have thought it best to set out, in writing, my opinion on each exception.

I first notice the exceptions to the bill of the register.

The first item excepted to is the charge of five dollars, "for one day's service under special order Form 4, examining papers," &c., August 15, 1867. The 47th section of the act provides that the register shall be paid "for every day's service while actually employed under a *special* order of the court, a sum not exceeding five dollars."

By the 10th section the justices of the supreme court of the United States are required to frame *general orders* for the following purposes :

"For regulating the practice and procedure of the district courts in bankruptcy, and the several forms of petitions, orders," &c.

"For regulating the duties of the various officers of said court," &c.

In pursuance to this authority the justices of the supreme court have framed general orders and forms.

By General Order No. 4, it is provided, that "upon the filing of a petition in case of voluntary bankruptcy the petition shall be referred to one of the registers in such manner as the district court shall direct, and *thereafter*

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all the proceedings required by the act shall be had before him, except such as are required by the act to be had in the district court," &c.

General Order No. 5, requires "that the time when, and the place where, the registers shall sit upon the matters arising under the several cases referred to them, shall be fixed by special order of the district court, or by the register acting under the authority of a general order, in each case, made by the district court;" and it enumerates what acts he shall perform and what proceedings he shall conduct.

Form No. 4 is the form prescribed by the justices of the supreme court, of the order which the district court is required, by General Orders 4 and 5, to enter on the filing of the petition in all cases of voluntary bankruptcy. It is entered as of course in every case, and requires the register to do nothing which he is not required to do by the act and the general orders. An order which the general orders require to be entered as of course in every case cannot, in any just sense, be termed a special order.

But it is argued, that this order is termed a special order by General Order No. 5, and that it must therefore be held to be such within the meaning of section 47. This argument is founded on a mistake. General Order No. 5 does not denominate order Form No. 4 a special order. It only provides that "*the time when, and the place where*, the registers shall act upon the matters arising under the several cases referred to them, shall be fixed by special order of the district court, or by the register acting under the authority of a general order in each case made by the district court." It is only "*the time when, and the place where*," the register shall act, that this rule contemplates may be fixed by special order. It does not contemplate that what service registers shall perform shall be fixed by special order, for that is prescribed in general terms by General Order No. 4, and specifically by General Order No. 5.

Now, order Form No. 4 does not specify any particular service that the register shall perform. It only refers the

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petition to him "to make adjudication thereon, and take such other proceedings therein, as are required by said act." True, it specifies a day on, or before, which the petitioner shall attend before him, and that he shall act at a particular place "upon the matters arising in the case," but it specifies "no special service" except perhaps "to make adjudication," and this specification is unnecessary, since Rule 4 of the general orders provides, that when the petition is referred to a register, "thereafter all proceedings, required by the act, shall be had before him, except such as are required by the act to be had in the district court," and section 4 of the act, among other things, provides that it shall be the duty of the register "to make adjudication of bankruptcy."

There is no service generally performed by the register in any case except such as is in one sense performed under order Form No. 4; for it requires him not only to make adjudication of bankruptcy, but "to take such other proceedings as are required by the act." It follows that if it is such a special order as to entitle the register, under section 47, to five dollars or less for one day's service in making "the adjudication of bankruptcy," it must also be a special order for every day's service performed under it. But, manifestly, this is not so, since section 47 provides * specific 27 compensation for nearly every service performed under the order.

Besides, General Order No. 5 does not require that either the time when, or the place where, the register shall act, shall be fixed by special order. Both may be fixed by the register himself, acting under the authority of a general order. The *time* is, in fact, so fixed by the terms of order Form 4, and the place is also practically so fixed under Rule 3 of this court. Now, it cannot be that the register is to be compensated for making adjudication, when the place at which he is to make it is specially fixed in the order of reference, and that he is to receive no compensation when he designates the place himself under a general order of the district court; and yet this proposition must be maintained

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in order to sustain this claim of the register. Such a position seems to me wholly unreasonable. It makes the compensation of the register, in this particular, depend not on the nature or quantum of service performed, but on the *form* of the order under which he acts, or rather, on the will of the judge, and thus tends to destroy that uniformity which both the Constitution and the bankrupt act contemplate.

I am sustained in this opinion by the opinion of the learned district judge of the Southern District of New York *In the Matter of Bellamy*. And if I were more doubtful of the correctness of my own opinion than I am, I should be inclined to follow his. I think it exceedingly desirable that the practice in the administration of the bankrupt act should be uniform throughout the United States.

The first exception is sustained.

The second charge excepted to is "for copy of order of adjudication furnished to bankrupt—two folios at 10c. and certificate 25c. — \$0.45."

This charge is in precise accordance with the fee prescribed in General Order 30. But I am of the opinion that this provision in General Order 30 is an inadvertence, so far as it allows twenty-five cents for certifying a copy of a paper when the certificate consists of only one folio. Section 10 of the act, among other things, authorizes the justices of the supreme court to fix the "fees payable, and the charges and costs to be allowed, except such as are established by this act or by law, . . . *not exceeding* the rate of fees now allowed by law for similar services in other proceedings." But the fee prescribed in the fee bill act of 1853, for a "certificate" is fifteen cents per folio. The justices of the supreme court had no authority to allow more.

As it does not appear that the certificate in this instance contains more than one folio, the fee for the copy of the order and certificate should be thirty-five cents and not forty-five cents.

I may also remark that this charge is not payable out of the fifty dollars deposited with the register, nor out of the

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estate of the bankrupt, but should be paid by the bankrupt himself. The service was performed for him and for him only, and not in the course of the proceedings, and he should pay for it. No order, however, to this effect can be made on the exception of the bankrupt, because it is not for *him* to object to payment out of either fund.

The exception is sustained so far as to reduce the charge from forty-five cents to thirty-five cents.

The next item excepted to is a charge of forty-five cents for a certified copy of memorandum, of two folios, forwarded to the clerk.

Section 4 of the bankrupt act requires the register "to make short memoranda in a docket of his proceedings, and to forward to the clerk a certified copy of said memoranda."

No. 30 of the general orders provides that the clerk and register shall have "for every copy of a paper in proceedings in bankruptcy — twenty-five cents for certifying the same, and in addition thereto, ten cents for each folio of one hundred words."

I think the memorandum in the docket is a "paper" within the meaning of this order; and therefore that the charge for the certified copy is right, except that it ought to be thirty-five cents instead of forty-five cents, for the reason mentioned when noticing the last exception.

The exception is therefore overruled, but the charge, and all similar charges in the fee bill, must be reduced as above indicated.

The next items excepted to are; first, a charge of thirty-five cents for "certified list of creditors who proved debts" furnished to assignee; and secondly, a similar charge for certifying said list to clerk.

The exception to the first item is sustained, and to the last overruled. In relation to the first, it is to be observed that the register furnishes the assignee a certified copy of the list of the debts proved, under sections 23 and 27, *only* when a dividend is ordered, and no dividend has been ordered in this case. In relation to the second, it is to be said that the

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clerk must give due notice (Form 52), and in order to give the notice he must have a list of the creditors who have proved their debts, and it is proper that the register or assignee should furnish it to him.

This list is a "*paper*" within the meaning of General Order 30, for the copying and certifying of which the register has the right to charge.

The exception to charge for order Form No. 15, and certificate of same, to charge for "order appointing assignees and notice," and to charge for making transfer of estate, are all sustained; and the exceptions to all similar charges are likewise sustained.

I see no foundation whatever for the last charge. I think the register should be paid for making the conveyance of the bankrupt's estate to the assignee, and, in fact, for every specific service which he performs, but neither the act nor the general orders provides any compensation for this service; and I am not authorized to tax a fee which is not provided for by law.

The register insists that the other charges are properly taxable under the fee bill act of 1853. He says that he performs, in the course of the proceedings, the functions of both judge and clerk, and that he should be paid for the service performed in both capacities — that the clerk is by the act of 1853, entitled to fifteen cents a folio, "for entering any order," and he argues that the first clause of section 47 of the bankrupt act gives him the fees of a clerk when he writes orders, or performs other duties of a clerk.

The clause referred to is as follows; "That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the register." Then follows the specification, first, of the fees of the register; and secondly, of the fees of the messenger.

It is insisted that this clause means that the register is

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entitled not only to the fees heretofore enumerated, but to the fees of clerk, in *addition*, where he performs the duties of clerk.

I think this is not its meaning, as might be easily shown by an analysis of its language and by an examination of the general provisions of the whole section. But I cannot stop to make either the one or the other. I simply say that it is very obvious that the whole section is to be construed as prescribing the fees of all the officers of the court, clerk, register, and messenger, and is to be understood as if read thus :

The "fees in bankruptcy" shall be as follows :

Of the clerk, these "as now established by law."

Of the register, these :

"For issuing warrants, two dollars," &c.

Of the messenger, these :

"For service of warrant, two dollars," &c.

The enumeration of these fees shall not prevent the judges, under the authority given them in section 10, from reducing them, or from prescribing a tariff of fees for all other services.

The exception to charge for copy of schedules for assignee, is overruled, but the charge for certificate must be reduced from twenty-five cents to fifteen cents.

Section 4 of the act requires the register "to furnish the assignee with a certified copy . . . of the schedules of creditors and assets filed in each case." I think that these schedules are "papers" within the meaning of the second clause of General Order No. 30.

The exception to charge for taking bond of the assignee with surety, is overruled with some hesitation. True, section 47 provides a specific fee of two dollars to the register for every bond with sureties ; but it appears in this case that the bond was required by the register and not by the *judge*, and I am of the opinion that under section 13 of the act, it is the *judge* only — that is, the district judge — who can require an assignee to execute a bond. Still, as the bond is, perhaps, not void, but valid as a common law, if not as a statutory bond, the register should, I suppose, be paid for taking it.

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The exception to charge "for application for second and third meetings of creditors" is overruled, but the charge should, I think, be reduced from two dollars to one dollar, as there was but one application.

Section 47 gives the register "for every application for any meeting under this act one dollar." This provision is not very intelligible. It is not certain whether it contemplates an application *to*, or *by*, the register, but, as it is more reasonable to pay one for his own services rather than another's, I suppose it means that whenever the register applies to the creditors, that is, orders them to meet, he is entitled to the fee. The court was not, it seems, applied to by the assignee under sections 27 and 28 to call the second and third meetings of creditors, but the register, when he directed order Form 51 to be entered, in pursuance of General Order No. 25, directed that the second and third meetings of creditors should be had on the day fixed in the order for the creditors to appear and show cause why a discharge should not be granted. Where there are no assets, and I have already said there are none in this case, I do not see any necessity for the second and third meetings of creditors, or that they are required by the act. These meetings, it seems to me, the act contemplates, are to be held only for the purpose of ordering a dividend. But as there are no assets, there could be no dividend. Why then should there be a meeting?

The register seems to understand General Order No. 25, as requiring the second and third meetings of creditors, even when there are no assets, and such seems to be its most obvious construction, but I think this cannot be its meaning if it be examined in connection with the provisions of the 27th and 28th sections of the bankrupt act.

It is therefore ordered that in future proceedings in
28 * bankruptcy in this district no meetings of creditors, except the first, shall be ordered where there are no assets, or where no creditor has proven his debts.

The exception to charge "for application for final meeting of creditors" is sustained.

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It appears that the "meeting" here termed a "final meeting" is the possible coming together of creditors in pursuance to the notice contemplated by section 29, to show cause why a discharge should not be granted. I think that this is not a "meeting" at all in contemplation of the act. It is not so denominated. The creditors are not required to "meet" but to "show cause," and this they might do without any "meeting." Nor is any "meeting" in fact held. Moreover, if this was a "meeting," there was no *separate* application made for it. It was applied for along with the second and third meetings, and for this application a fee has already been allowed.

The exception to charge "for attending second and third, and final meetings under order 51," is sustained so far as to reduce the charge to three dollars.

I do not regard order Form 51 as a special order, for the reason given when noticing the first exception; and section 47 allows only three dollars for each day in which a meeting is held.

The exception to charge "for final examination of bankrupt, ten folios at twenty cents, and certificate twenty-five cents," is overruled, except that the charge for the certificate should be fifteen cents, and not twenty-five cents as before stated.

Section 47 prescribes as a fee to the register for taking depositions, the fees now allowed by law. The act of 1853 allows for taking depositions twenty cents a folio. I think the "final examination" is a *deposition* within the meaning of the 5th and 26th sections of the act.

The exception to charge five dollars for one day's service, under special order of the 25th November, is overruled.

This order was not made as of course in the proceedings. It requires the register to render a service not specifically enjoined on him by either the act or general orders. It requires him to examine the papers and steps, and to report to court on their regularity. I therefore think it is a special order, for service under which the register may, under

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section 47, be allowed five dollars. It is therefore ordered that he be allowed that sum.

The exception to charge "for discharge" is overruled.

Section 47 provides that the registers shall have, as a fee, two dollars for every discharge, when there is no opposition. There was no opposition in this case, and therefore the charge, being expressly provided for; must be sustained. I do not know why the register should be allowed a fee for a discharge, when there is no opposition, and none when there is opposition, nor why he should be allowed a fee in either case, since, by the terms of section 4 of the act, he cannot grant a discharge in any case. But the law expressly allows the fee where there is no opposition, and I have nothing to do with its reasonableness.

The exception to charges "for stationery," "postage," and "incidental expenses, rent, clerk hire," &c., are all sustained. There is no warrant for these charges, either in the act or the general orders. The register was not required to render, and did not render, any service in this case at any place other than his residence; consequently he has incurred no travelling expenses, and no expenses incident thereto. It is such expenses incurred by the register, and such only that are, I think, provided for by section 5 of the act, and by General Order No. 12.

I come now to consider the exceptions to the clerk's fee bill.

The first exception is to charge "filing and entering petition and schedules and oaths A and B @ 10c. — 30c." — and it is overruled. The bankrupt contends that the petition and schedules are *one* paper, and therefore that the fee should be ten cents. I think they are *three* papers at least.

The exception to charge for "issuing order Form 4, one dollar," is sustained.

The clerk insists that this order is a *process*, inasmuch as it requires the register to proceed, and the petitioner to appear before the register; and, therefore, that he may charge one dollar therefor under the act of 1853.

I think it is not a process, but simply an order. It is de-

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nominated an order in the last clause of General Order No. 4, and a copy of it is there required to be sent or delivered to the register. The charge should be as for a copy under the act of 1853.

The exception to the charge of sixty-five cents for drawing assignment and affixing seal of court to it, is overruled, if the clerk really rendered the service charged for. By the act of 1853, the clerk is entitled to fifteen cents a folio for drawing any bond, making any record, &c., and ten cents a folio for copying same. I think the drawing of the assignment, when really executed by the clerk may, by a liberal construction, be covered by this provision. The statute seems to allow the clerk fifteen cents a folio for drawing all original writings, and ten cents a folio for copies. Of course, if he does not, in fact, perform the service, as is intimated he did not in this case, he is not to be paid.

The exception to charge for "issuing warrant Form 45," is overruled.

Form No. 45, though in one sense an *order*, is required to be issued by the clerk under the seal of the court and *delivered* to the bankrupt. I think, therefore, that it is a process within the meaning of General Order No. 2 and of the fee bill act of 1853.

The exception to charge for "certificate of discharge and seal" is overruled. The certificate of discharge is not, as the counsel of bankrupt supposes, the same thing as the order of discharge. The one is entered in the minute or order book of the court, and the other is delivered to the bankrupt.

The exception to charge for "entering on six papers, certificate of day and hour of filing at fifteen cents a folio," is overruled.

General Order No. 1 requires the clerk to enter upon each petition in bankruptcy the day, and hour of the day, upon which the same shall be filed, and, also, to make a similar note upon any subsequent paper filed with him. When this entry or note is made, it is evidence of the facts stated, and is, for every legal purpose, a certificate. And, I think, it is to

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be regarded as a certificate within the fee bill act of 1853, for the making of which the clerk may charge fifteen cents for one folio.

I do not understand how this charge happens to be made in reference to only six papers. In my opinion this entry should be made on *every* paper filed with the clerk, whether filed with him in the first instance, or with the register first, and then with him; and I think that every writing is "a paper" within the meaning of this rule, no matter of how many sheets it is composed, which relates to one particular subject.

To illustrate: I think the petition is one paper, schedule A and oath another, order Form No. 4 another, order Form No. 5 another, and so on.

I also think that the "filing and entering of each paper" is a service distinct from the certifying "upon" it of the "day and hour" of its filing. In the one case the entry is made in the docket and in the other *upon* the paper itself. I am therefore inclined to think, and do order that the exceptions to the charges for "filing and entering papers delivered to him by register," be overruled.

I observe a charge in the bill of the clerk "for clerk's certificate and seal to judge's signature to certificate of discharge," which is not excepted to, and which could not be excepted to by the bankrupt, if, as I suppose, this service was rendered at his request. But I think it proper to say, that in my opinion this charge should be paid by the bankrupt himself, and is not payable out of the fifty dollars deposited under section 47, nor out of the estate of the bankrupt. Neither the act nor the general orders require any such certificate, and it is, therefore, not a service rendered in the course of the proceedings in bankruptcy.

The bill of the messenger embraces the following items only:

For service of warrant	\$2 00
For each written note to creditors in schedule, 10 cents	6 90
For actual and necessary expenses in publication of notices	4 00
Postage	1 97
For copying notices, 483 folios, 10c. per folio	48 30

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The marshal says he does not think the law authorizes the last charge, but he is informed that the practice in other districts is to allow it, and, therefore, he submits to the court whether he is or is not entitled to it notwithstanding his own opinion is adverse to it.

My information corresponds with that of the marshal so far at least as the practice prevails in *some* of the districts. I think, therefore, he has very properly submitted the question to the court. I would unhesitatingly allow the charge if I thought it authorized, wholly irrespective of the opinion of the marshal in relation to it.

The 47th section of the bankrupt act provides that the messenger shall be paid the following fees :

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Third. "For each written note to creditor named in the schedule, ten cents."

Fourth. "For custody of property, publication of notices, and other services, his actual and necessary expenses," . . . the same to be taxed or adjusted by the court.

"For cause shown, and upon hearing thereon, such further allowance may be made as the court in its discretion may determine."

I do not think that this last clause means to authorize the court to make a "further allowance" for the performance of service by the messenger, for which a specific compensation is provided in the act. The law allows the messenger specifically "ten cents for each written note to the creditor named in the schedule," and I see not upon what pretence the court can, under this clause, allow more. But I do not understand that this charge is anywhere attempted to be sustained under this clause, or under any provision of the bankruptcy act. If I am informed correctly, it is claimed under the fee bill act of 1853, which gives the marshal a fee of "ten cents per folio for copies of papers furnished at the request of any party." But I do not see that these notices are copies of any paper. Each notice is an original paper, and each differs from the others, at least in the name of the

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person to whom it is addressed, and usually in the name of the place to which it is directed.

It is true, that the body of all the notices is identical, but this does not make any one a copy of another. No one is any more a copy than another.

Therefore, if one is a copy all are copies, and if one is an original all are originals. There can be no copy without an original, and as one must be an original, it follows that all are originals. Moreover, these notices are not "furnished at the request of any party." They are sent by the messenger, because the law requires him to send them, and not because they have been requested by any one; and the law having prescribed a fee of ten cents for each written notice, I think

there is not the slightest ground for allowing more under * any such pretence as that all but one are copies, or under any pretence whatever.

Each of the notices in this case follow precisely the form prescribed by the justices of the supreme court in Form No. 6, and each contains seven complete folios. The fee of ten cents for each is, therefore, grossly inadequate, but I am not authorized to substitute my judgment for the provisions of the statute.

The register has recommended that the assignee be allowed ten dollars as a reasonable compensation for his services, besides the actual disbursements made by him. The bankrupt objects to this allowance as unauthorized by the act. He does not object to the reasonableness of the allowance, if it is authorized, but he contends that there can be no allowance to an assignee, except "out of money in his hands," and it is admitted that there is no money in his hands in this case. On the other hand, the assignee asks for a larger allowance than ten dollars. The papers show that no assets or effects whatever were surrendered by the bankrupt, and that, in fact, he had nothing except his wearing apparel. Only one creditor proved his debt. And the assignee has had the least possible amount of trouble in attending to his duties in the case. I think, therefore, that the allowance recommended is

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reasonable, and cannot be complained of by the assignee. But the question remains, Is any allowance authorized?

Section 47 provides, that the assignee "shall be allowed, and may retain, out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court."

I think it too plain for discussion, that this provision means, that the assignee is to be allowed both his disbursements, and, at all events, a reasonable compensation for his services in all cases, and that he may retain the sum allowed out of money in his hands, if he has any. The assignee is required to give notices by mail and by publication in newspapers, and to perform other services, involving actual expenditures. It is preposterous to suppose, that these disbursements are not to be refunded except where assets come to his hands; and the statute places the allowance of a reasonable compensation for services precisely upon the same footing as the allowance for disbursements. Besides, section 28 provides that he "shall not be obliged to proceed until the necessary funds are advanced or secured."

The provision contained in section 28, relating to this subject, does not conflict with the provision in section 17, except so far, perhaps, as to limit the allowance for receiving and paying out money, to a certain per centum graduated by the amount.

The actual disbursements made by the assignee have been paid him, by the bankrupt, but he is allowed the further sum of ten dollars.

The taxation of the various officers must be reformed so as to accord with the principles announced in this opinion.

In re Isidor & Blumenthal.

* U. S. DISTRICT COURT, S. D. NEW YORK.

Where creditors applied for an order that bankrupts attend and submit to an examination under section 26, and it appeared that ample opportunity had previously been given to so examine the bankrupts :

Held, that the application for examination after the expiration of time allowed to amend specifications was unreasonable, as no cause for doing so was shown by affidavit.

In re ISIDOR & BLUMENTHAL.

BLATCHFORD, J. In this case creditors opposed the discharges of the bankrupts and filed specifications of opposition before the register, which, with all the papers in the case, have been transmitted to the court by the register. The court has held the specifications to be irregular in form, and has allowed ten days' time to the opposing creditors to file new specifications. The creditors now ask for an order that the bankrupts attend and submit to an examination under section 26 of the act. This application is made on behalf of fourteen creditors, who have filed notices of the entry of appearances in opposition. One of such notices is on behalf of William Brunner & Co., who have not proved their debt. As to the other thirteen, the debts of three of them were proved September 6, 1867; the debt of one of them was proved September 12, 1867; and the debt of the remaining one of them was proved November 22, 1867. The day for showing cause against the discharge of the bankrupts was December 28, 1867. Abundant opportunity was afforded to these creditors to examine the bankrupts on oath under section 26, but none of them took any steps for that purpose. The bankrupts were examined at considerable length by one of the assignees on an order obtained for that purpose by the assignee. Those examinations took place from December 16 to December 27, 1867, and are on file among the papers. Under these circumstances, I do not think it would be reasonable to require the bankrupts now to submit to a new examination under section 26, especially as no reason for doing so is shown by affidavit.

In re Mawson.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where it appears from testimony elicited on the examination of a bankrupt before a register, that a creditor was influenced by a pecuniary consideration paid to the creditor's attorney, although a very small one, not to oppose the discharge of the bankrupt, and the proceedings are certified up by the register to the district court, with the opinion of the register that such payment should not deprive the bankrupt of his discharge :

Held, That such question is not a proper one for the register to certify to the district judge, inasmuch as the register is forbidden to hear any question as to the allowance of an order of discharge .

In re MAWSON.

THE above named bankrupt filed his petition herein on the 11th day of July, 1867, and a warrant in bankruptcy was issued out of this court and a meeting of the creditors of said bankrupt was ordered for the 19th day of August, 1867, on which day the firm of Arnold, Neusbaum & Nordlinger of Philadelphia, creditors, proved their claim and appeared by their solicitor to oppose the discharge of said bankrupt. Their solicitor afterwards obtained an order for the examination of said bankrupt.

Before the return of said order, or the examination of said bankrupt, said Arnold, Neusbaum & Nordlinger withdrew their opposition.

Other creditors proved their claims ; one of them, Felix L. Bauer, obtained an order from the register for the examination of the bankrupt, and the said bankrupt was sworn and examined before the register on the 23d day of January, 1868.

Upon said examination the bankrupt testified as follows :

Question by solicitor of opposing creditors. How much do you owe the firm of Arnold, Neusbaum & Nordlinger of Philadelphia ?

Answer by the bankrupt. I owe Arnold, Neusbaum & Nordlinger of Philadelphia about \$2,326.18.

Q. Have you called upon that firm, or sent any person to them with reference to their withdrawing their objection to

In re Mawson.

your discharge since your petition was filed? If so, state what you promised them, if anything.

A. Yes; I have seen them in consequence of having heard that Mr. Solis, the opposing creditor, had misrepresented the facts of my case to them. I called upon them to disabuse their minds that I was no partner in the house of George King, but was there merely on salary; I made them no promise, directly or indirectly, nor any one for me.

Q. Did they not agree to withdraw their opposition if you would pay the expenses they had incurred in your bankruptcy proceeding?

A. They stated that they had been to some trifling expense in the matter, and they supposed I would pay that. I said I would have no objections to pay that expense.

Q. To whom did you pay that sum? and how much was it?

A. To Mr. Jacobs of this city; it was twenty dollars.

Q. And they have withdrawn their opposition?

A. They had withdrawn it before I paid the money.

The said Felix L. Bauer, one of the opposing creditors, now claims that the said bankrupt should not be discharged, for the reason that he has in violation of section 29 of the "act to establish a uniform system of bankruptcy throughout the United States," &c., procured the assent of said creditors, Arnold, Neusbaum & Nordlinger, to his discharge, and has influenced the action of said creditors pending these proceedings by a pecuniary consideration or obligation, and said opposing creditor desires the opinion of the district judge upon the question above stated.

J. SOLIS RITTERBAND,
Counsel for opposing creditors.

January 24, 1868.

I, John Fitch, the register in the above entitled cause, do certify to the court:

First. That this is one of the cases provided for in section 6 of the bankrupt act, and that at this stage of the proceedings the creditors had a right to ask the opinion of the dis-

In re Mawson.

strict judge as to the matter raised by the testimony of George S. Mawson, the petitioner, as to the effect of the payment of \$20 to Mr. Jacobs of New York, for Arnold, Neusbaum & Nordlinger of Philadelphia, as set forth in the said testimony.

Second. That by the 29th section of ~~the~~ bankrupt act, "or if he or any person in his behalf, ~~has~~ procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation, then no discharge shall be granted."

Third. The claim of the creditors as proven, namely, Arnold, Neusbaum & Nordlinger, was, as stated by the petitioner, about \$2,326.18. The sum paid to Mr. Jacobs was \$20, which was the amount of expenses they had incurred in the matter. The sum paid was small; yet small as it was, it may have caused them to cease opposing, or rather they did not oppose the discharge of the bankrupt on the 24th day of January, 1868, the day the order to show cause was returnable; the hearing was adjourned to the 31st of January, 1868.

Fourth. I feel compelled to certify that from the petitioner's testimony, the action of the creditors was influenced in some degree by the payment of the \$20 to Jacobs, and small as it was, it may bring this case within the 29th section of the bankrupt act, although Mr. Jacobs is a lawyer, and it was probably his legal charge that was paid, and none of the \$20 ever went to the hands of the creditors, and was not a payment of any part of the creditors' claim.

Fifth. Upon a thorough examination of the testimony and the law applicable thereunto, I cannot say that the \$20 so paid to Mr. Jacobs was any part of it paid to the creditors, and certify * to the court, that upon a fair 34 and just construction of the act, I do not think the payment of the \$20 to the creditors' lawyer should deprive the petitioner of his discharge, which, as the case now stands, he would otherwise be entitled to. I feel that the courts should give a fair, just, and liberal construction to the act, and not rigidly construe its provisions against the bankrupt, as the whole scope of the act is liberal and not oppressive.

JOHN FITCH, *Register.*

In re Fredenburg.

BLATCHFORD, J. I do not think that the question certified, as to whether the bankrupt is or is not, on the fact set forth, entitled to his discharge, is one on which the opposing creditor is at liberty, at this stage of the case, to take the opinion of the district judge under section 6 of the act. The question is not one which has arisen or can arise in the course of the proceedings before the register, for the reason that by section 4 of the act the register is forbidden to hear any question as to the allowance of an order of discharge. Nor is it a question which has arisen upon the result of any proceedings before the register, because no such question can arise upon the result of any such proceedings until the opposing creditor has filed, under General Order No. 24, a specification of the ground of his opposition to a discharge; and when that is done, the case is then *ipso facto* removed from before the register and taken into court, under section 31 of the act and General Order No. 24 and Rule 16 of this court.

January 28, 1868.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where a witness objects by counsel to examination, on the ground that there was no question in controversy to be settled by testimony, and that the examination of witnesses is not in order until after an examination of the bankrupt: *Held*, "Counsel for witness" is an anomaly leading to confusion and delay. That register decided correctly that witness should submit his examination *non obstante* the objections of his counsel.

That under section 28 of the act, the court can compel the examination of any witness; that submitting to the examination waived the objection, and that the register should have refused to certify the question.

In re FREDENBURG.

I, JAMES F. DWIGHT, one of the registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said cause before me, the following questions arose pertinent to the said proceedings, namely:

Facts. On the 27th of January, one Henry Manheims, who had been regularly summoned as a witness herein by an order dated January 22d, made on the application of the assignee

In re Fredenburg.

herein, was before the register for examination. The witness had appeared in obedience to said summons on the 23d inst., had been sworn, and his examination had commenced. By agreement between the assignee and witness, the examination had been continued and adjourned until the 27th inst.

And at the commencement of the examination this day, the said witness objects to being examined, "because there is no authority to examine a witness in any matter unless there be a question in controversy to be settled by testimony, and not until after the examination of the bankrupt himself."

Counsel for witness and the assignee being heard, the register overruled the objection, and decided that the witness may be examined as prayed for by the assignee.

Whereupon the witness prays that the question may be certified to the judge for decision, under the provisions of section 6 of the act, whether he shall be examined.

Without standing upon the objection, the witness submitted himself to examination, which was concluded.

The bankrupt himself has not been examined. An assignee has been chosen and is duly qualified. The assignee has obtained an order for the examination of the bankrupt himself, but the bankrupt could not be found within the district, although he has received no permission to depart, from the register.

In my opinion the objection of the witness is not a valid one. Section 26 of the law provides that "the court may, on the application of the assignee in bankruptcy, require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath, upon all matters relating to the disposal or condition of his property," &c.

"And the court may, in like manner, require the attendance of *any other person as a witness*," &c.

There is no restriction in the statute as to the circumstances antecedent to the examination of a witness, and the provision of this section seems clear to me; otherwise, in the case of the death or absence of a bankrupt, the assignee or creditor would be unable to gain information sought for, concerning the bankrupt's property and disposition.

In re Fredenburg.

I think the witness, Henry Manheims, was properly under examination.

Which said facts and opinion of register are respectfully submitted, this 13th day of January, 1868, for the decision of the judge.

JAMES F. DWIGHT, *Register*.

BLATCHFORD, J. In answer to the questions certified in this case I reply,

First. The question is certified on the prayer of the witness, under section 6 of the act. The register might properly have refused to certify the question. It is only a party to the proceedings before the register who can take the opinion of the District Judge, on a certificate of the register, in a matter arising in the course of such proceedings, or upon the result of them. The word "party" means the bankrupt or a creditor of his. It does not mean a witness, who is not the bankrupt or a creditor of his.

Second. I notice, from the certificate of the register, that the witness was represented before the register by counsel.

The certificate speaks of the "counsel for witness." This is an anomaly. It can only lead to confusion and delay. It is only parties, the bankrupt or a creditor, who are entitled to be represented by counsel, either before the register or the court, unless where a witness is made a party to a new collateral proceeding, by being cited to answer for an alleged contempt.

Third. The register was correct in his decision, that the witness was properly under examination.

Fourth. The register certifies that the witness, without standing on the objection, submitted himself to examination. Section 7 of the act provides that if any person examined before a register refuses or declines to answer, the Judge shall have power to order such person to pay the costs thereby occasioned, if such person be compellable by law to answer, and such person shall also be liable to be punished for contempt. The objection made by the witness in this case was so entirely frivolous, that if he had not submitted to an examination,

In re George S. Mawson.

the case would have been a clear one for the imposition of costs and for punishment for contempt.

The objection made was that there is no authority to examine a witness in any matter under the bankrupt act unless there be a question in controversy to be settled by testimony, and not until after the examination of the bankrupt himself. The 26th section of the act, under which section the witness in this case was summoned, requires him to submit to an examination on oath, upon all matters relating to the disposal or condition of the bankrupt's property, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof according to law. In addition to this, the court can compel the giving of testimony by witnesses, in the taking of evidence under section 38 of the act. The objection made by the witness was wholly without foundation, and the fact that he himself was unwilling to stand upon it, showed that he regarded it as untenable.

Fifth. Although the objection was made, yet, by submitting to an examination, which the register states was concluded, the witness waived the objection, and after that there was no point or matter, within the meaning of section 6 of the act, to be certified by the register, and he ought on that ground to have refused to certify the question.

* U. S. DISTRICT COURT, S. D. NEW YORK.

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Proceedings on the return day of an order to show cause why the discharge should not be granted, can be adjourned by reason of the adjournment of the examination of the bankrupt.

In re GEORGE S. MAWSON.

THE above named bankrupt, by Mr. Nye, his counsel, requests the opinion of his honor the district judge, upon the

In re George S. Mawson.

point whether the proceedings, upon the order to show cause why the discharge should not be granted, can be, on the return day of said order, adjourned by reason of the adjournment of the examination of the bankrupt, and also upon the point whether the examination of the bankrupt can be adjourned, beyond the return day of the order to show cause why the discharge should not be granted, without an enlargement of the time for the examination of the bankrupt for cause shown; and the bankrupt states that the petition to be adjudged bankrupt was filed in this matter on the 11th day of July, 1867, the first meeting of creditors was held on the 19th day of August, 1867, and the order to show cause why the discharge should not be granted was returnable December 20th, 1867, and said return day adjourned for the purpose of the examination of the bankrupt by the counsel now applying for another adjournment of said return day, and successively adjourned to the 27th of December, 30th December, 31st December, 4th January, 9th January, and 24th January, and no examination was had on the said return days except the 27th December, and 9th of January; and that the counsel for the bankrupt on said 9th of January, tendered him to said opposing counsel for examination continuously until the said 24th day of January, and now again tenders him for examination, but the said counsel declines to examine said bankrupt.

And in regard to the certificate, filed by said opposing counsel for the opinion of this court, said bankrupt claims that the question therein stated is not the proper subject matter for a certificate, because the act has provided another particular way for determining whether the bankrupt shall have his discharge or not.

FRANCIS C. NYE,
Counsel for Bankrupt.

To his Honor JUDGE BLATCHFORD.

First. The register certifies, that the proceedings upon the order to show cause why the discharge should not be granted, &c., can, the same as any other proceedings, be adjourned

In re George S. Mawson.

upon proper reasons shown therefor, and continued by adjournment until the order is either granted or the cause be sent to the district judge, upon the filing of the objections by the creditor as provided for by section 31 of the act. Such adjournments are necessitated from the fact that the necessary papers are not often ready for the register to act upon.

The examination of the petitioner by a creditor or assignee is the equivalent to the examination of a witness at the circuit, and is, by the effect of the bankrupt law, in the nature of a cross-examination.

The same rule should apply to the examination of the bankrupt before the register as at the circuit. The examination should proceed regularly with such adjournments as the circumstances of the case require. The register should use a proper discretion in the case before him, and not allow any unnecessary or unreasonable adjournments.

Second. The register would certify to his honor, the district judge, that the lawyers consult their own convenience as to the time of the examination of the bankrupt, and select their own hours to do it in, when they are not otherwise engaged, and in this way make their cases in bankruptcy subservient to their other cases in the state courts. This practice impedes, delays, and hinders the proper proceedings in causes, and most unnecessarily occupies the time of the register, for which he does not often receive any pay.

The register certifies, that the statement as set out in the request of the attorney for the petitioner, does not fairly present this case, for the reasons, that almost all the adjournments were by consent of the parties, for their own convenience, or by the neglect of the respective attorneys to attend to their duties in this cause, owing to their other professional engagements.

That the adjournments were almost all had on the examination of the petitioner by a creditor whose claim was barred by the two-third act, as was shown by the examination of the petitioner, and the discharge papers; that another creditor procured an order for the examination of the peti-

In re George S. Mawson.

tioner, and the adjournment on the day of the order to show cause, &c., was had to give time for the judge to pass upon the certificate of the register, as requested by the attorney for the creditor, which the court has done ; the register had the power to grant it.

Third. The court having disposed of the question as certified to the court by the register, on the application of the attorney for the creditor as to his rights at this stage of the cause to set up the question of fraud, no question now arises on question 1st.

JOHN FITCH, *Register.*

BLATCHFORD, J. In answer to the question as certified in this case, I reply :

First. The proceedings upon the order to show cause why the discharge should not be granted, can be, on the return day of said order, adjourned, by reason of the adjournment of the examination of the bankrupt.

Second. The second question certified is not clearly stated, and I am not sure I understand it. The examination of the bankrupt can be adjourned beyond the return day of the order to show cause why the discharge should not be granted. Such adjournment necessarily operates as an enlargement of the time for the examination of the bankrupt. The presumption is that the register will not grant such adjournment except for good cause shown.

The clerk will certify this decision to the register, John Fitch, Esq.

February 5, 1868.

In re William D. Hill.

* U. S. DISTRICT COURT, S. D. NEW YORK.

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Specifications in opposition to the discharge of a bankrupt must be specific, but if a creditor desires to amend where they are too vague, or take further testimony in support thereof, he may do so. When the bankrupt has taken and subscribed the oath required by section 27 of the bankrupt act, the burden of proof is on the creditor to show that he has forfeited his right to a discharge.

In re WILLIAM D. HILL.

BLATCHFORD, J. In this case I have examined the written specifications filed on behalf of William S. Preston, a creditor, of the grounds of his opposition to the discharge of the bankrupt. All of them are in proper form to be triable, except those hereinafter mentioned. The one in regard to placing the bankrupt's property in the hands of his wife is too vague and general, unless it means that the bankrupt placed all his property in the hands of his wife, otherwise the specification should state what property. The specification in regard to the withholding of his books, papers, and documents, is too vague and general, unless it is intended to cover all his books, papers, and documents, otherwise it should specify which of them. The general charge of fraud against the act is too vague. It should specify the particular fraud. As I understand the specifications they state that the evidence already taken before the register shows that the bankrupt had placed his property in the hands of his wife, and has withheld his books, papers, and documents, and has been guilty generally of fraud against the act. I shall allow the creditor, if he desires, to amend, within ten days, his specifications, in the particulars so held not to be triable. If either party shall desire to take further testimony as to the matters embraced in the specifications, it must be referred under section 38 of the act to Register Gates to take such testimony and report to the court; and when his report comes in, either party can bring the case on for hearing on any Saturday on four days' notice to the other party, and to the clerk.

In re Jules Clairmont.

The issues to be tried and decided will be the allegations in other specifications, and, as the bankrupt has taken and subscribed the oath required by section 29 of the act, the burden will be upon the creditor to show that the bankrupt has forfeited his title to a discharge by having done some of the things specified in section 29 as grounds for withholding a discharge.

U. S. DISTRICT COURT, MASSACHUSETTS.

A person who has been of counsel for a bankrupt may be appointed assignee, it being understood that he cannot occupy the position of counsel and assignee at the same time.

In re JULES CLAIRMONT.

LOWELL, J. The register has certified to me the question, whether William P. Porter ought to be confirmed as assignee. Accompanying the certificate is a petition from a firm who say that they are creditors of the bankrupt, but whose debt was postponed by the register under section 23, and has not been proved. This petition sets forth several grounds for objecting to Mr. Porter, and is sworn to ; but I infer from the way in which the case comes before me, that it is put in rather in aid of the register's certificate, than for any other purpose. No issue of fact is asked for, and the petitioners are not in a position to ask for any, because the question whether they are creditors or not, has not yet been determined, and if they are not they have no interest in the appointment.

The register certifies that there is no possible objection to the competency or character of Mr. Porter, but certifies the question whether he ought to be rejected because he has been of counsel for the bankrupt.

I do not regard this as a valid objection to his appointment. Of course it is to be understood that he cannot occupy the position of counsel and assignee at the same time.

In re Jules Clairmont.

If he has been the bankrupt's attorney in the proceedings, he must withdraw from that position. The petitioners' fear seems to be that the assignee is prejudiced against their claim. If any such prejudice should show itself, it would be ground for removal; but such a charge ought not to be lightly entertained against a gentleman of character. It is to be presumed that he will deal impartially with all registers and all persons.

It is very common to appoint persons assignees by the choice of the creditors, who either as creditors or otherwise have taken part in some controversies touching the bankrupt's affairs. In most contested cases it would be difficult to find an interested party who was not more or less committed to some side of the dispute. It is also very common to elect the attorney of the debtor or some opposing creditor. Without laying down any general rules, I may say that the same objection of former interest or bias, would not usually suffice to defeat the approval of a person of standing and character.

It is not very obvious that the assignee could do any great injury to a creditor, if he were so disposed. His conduct is always open to the supervision of the court, and if he unreasonably and vexatiously opposes and litigates the proof of just debts, there are remedies by the imposition of costs *de bonis propriis* and otherwise, which are sufficiently stringent. But such conduct is not to be anticipated.

In re Taylor R. Stewart.

U. S. CIRCUIT COURT, N. D. ALABAMA.

A creditor who has a mortgage may apply to the bankrupt court to have the property covered by his lien sold, the proceeds to be applied to the payment of his debt. Should the security fail to satisfy the claim, such creditor may be allowed to prove for the part remaining unpaid, and obtain a dividend thereon.

In re TAYLOR R. STEWART.

IN the proceedings before the register in this case, Joseph W. Burke, the question arose respecting the disposition of certain mortgaged property of the petitioner, and upon the request of the assignee, the register certified the question to the judge.

He certified that the bankrupt, Taylor R. Stewart, filed his petition in bankruptcy on the 4th day of September, 1867, enumerating in his schedule as a creditor "holding security," William Echols, said security being specified as follows: "A deed of trust given to John G. Coltart, to secure George W. Jones and John W. Scruggs, securities for the land mentioned in Schedule B — 1."

It appears that in the year 1860, the bankrupt, as joint purchaser with one William R. Stewart, bought from Echols the land described in Schedule B — 1, giving in payment therefor four promissory notes, each for the sum of \$312.50, and payable respectively, in one year, two, three, and four years after date.

On those notes George W. Jones and John W. Scruggs were sureties, and to secure them in the liability thus incurred, the bankrupt and his joint tenant made to John G. Coltart a deed in trust, providing that if any of the said notes should fail to be paid at maturity, the land should be sold by the trustee and the proceeds appropriated to the payment of the debt of Echols.

The first three notes were paid at maturity; the last remains unpaid, and is the debt specified in the bankrupt's schedule as due William Echols.

Although the creditor Echols is not mentioned as a party

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to the deed, its terms distinctly prescribe that the proceeds of the property, covered by it, shall be devoted to the payment of his debt, the object seeming to be to secure for the creditor the personal security of Jones and Scruggs, as well as the equitable security afforded by the terms of the deed.

It is well settled that a creditor is entitled to the benefit of the indemnity held by the surety, and can seek in equity to be subrogated to his rights, reach the security, and satisfy his debt. In this sense Echols is secured, as no act of the bankrupt or of the sureties can defeat his equity under the terms of the deed.

If the question presented no other feature, and if the security appeared to be sufficient only to pay the debt, the assignee might, under the direction of the court as prescribed in the 17th and 20th sections of the bankrupt act, release all claim to the security upon agreement with the creditor *properly controlling* the same, but the great difference in the value of the property covered by the deed of trust at the time of its purchase, specified at \$1,200, and the present estimated value (\$100) set forth in the schedule of the bankrupt, affords in my judgment a proper subject of inquiry.

The 1st section of the bankrupt act provides that the jurisdiction of the district courts of the United States in bankruptcy shall extend to "the collection of the bankrupt's assets and the ascertainment and liquidation of the liens and other specific claims thereon."

Section 14 prescribes that "the assignee shall have authority under the order and direction of the court to redeem or discharge any mortgage or conditional contract, pledge or deposit, or lien on any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same, subject to such mortgage, lien, or other incumbrance." The jurisdiction thus conferred on the court, and the authority given to the assignee under its instructions, in my opinion refers to all liens existing on the property of the bankrupt. If a creditor has a mortgage or pledge for his debt, he may apply to the court to have the

In re Walter C. Cowles.

same sold, the proceeds thereof applied towards the payment of his debt *pro tanto*, and if the debt is not fully satisfied out of the security, may prove for the residue. In like manner may the assignee, acting in the general interest of the creditors, apply to have the lien ascertained and liquidated, or for an order directing the sale of the property held as security for any debt existing or provable under the bankruptcy, as the most correct means of ascertaining its true value, and out of the funds in his hands, derived from the sale, may pay to the creditor the amount of his debt covered by the security. By these means the correct *status* of the creditor may be determined, and should the security fail to satisfy his debt, he may be admitted to prove the part remaining unpaid, and obtain his just proportion of the bankrupt's assets. The register further certified that it was his opinion, that the assignee should apply for an order directing the sale of the property, holding the fund obtained therefrom subject to the lien of this creditor properly asserted in equity, and to the order of the court.

Judge BUSTEED agreed in the conclusions at which the register arrived, and directed the necessary order for the sale of the property by the assignee, to be entered on the proper application.

U. S. DISTRICT COURT, MINNESOTA.

A debtor who executes a chattel mortgage to secure a preëxisting indebtedness with intent to delay, hinder, and defraud his creditors, commits an act of bankruptcy. It is not necessary to show the stoppage of payment of commercial paper was fraudulent; suspension of payment and non-resumption within fourteen days is all that is contemplated by this provision of the bankrupt act.

One who is engaged in the manufacture and sale of lumber is a trader within the meaning of the said act.

In re WALTER C. COWLES.

IN this case a petition was filed by S. G. Renick, president of the First National Bank of Hastings, against the said

In re Walter C. Cowles.

Cowles, alleging the commission of various acts of bankruptcy, and praying that he should be adjudged a bankrupt by the court. A day was fixed to show cause, a denial of the acts was filed, and by agreement the issues were tried by the court.

Judge NELSON delivered a written opinion. He said the petition in substance charges :

I. That the said Cowles, being possessed of certain estate, rights, and credits, made a conveyance of the same with intent to delay, hinder, and defraud his creditors.

II. That said Cowles, being insolvent, made a * con- 43
veyance with intent to give a preference to one of his creditors, and with intent to defeat the operation of the bankrupt act.

III. That, being a trader, the said Cowles has fraudulently suspended, and not resumed payment of his commercial paper within a period of fourteen days.

On the return day of the order to show cause, a denial of the acts of bankruptcy was filed, and by agreement the issues were tried by the court.

We shall consider the various acts of bankruptcy alleged in the order in which they are above enumerated.

The testimony shows that Cowles was engaged in the manufacture and sale of lumber in the city of Hastings, and that he, being in embarrassed circumstances, with an indebtedness, as stated by himself to be over thirty-seven thousand dollars, without any cash means, but other assets estimated as high as sixty thousand dollars, and as low as thirty-two thousand dollars, executed to the Merchants' National Bank of Hastings, on the 23d day of October, 1867, a chattel mortgage upon five hundred thousand feet of pine saw logs then lying in the St. Croix River at Prescott, Wisconsin, to secure the payment of three thousand dollars. That the money advanced to him at the time of the delivery of this mortgage was one thousand dollars, and that a due-bill was given for the balance, to be paid in weekly instalments. A part of the one thousand dollars advanced was used to release from

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an attachment the logs embraced in the mortgage, and the money to be paid by instalments was to be used for the purpose of defraying the expenses of sawing the logs into lumber. It appears that at this time his creditors were pressing him for the payment of their demands, and his answer invariably was that he would pay them as soon as he could cut his logs, and as fast as he could sell his lumber. These repeated statements appear to have satisfied his creditors, and they remained quiet until about the 22d day of November last, when some of them made an arrangement to take lumber for their indebtedness: Taylor & McHugh, and Pringle, commenced immediately to draw lumber from the yard, and continued until November 25th, when they were stopped by Van Dyke, president of the Merchants' National Bank, and by C. D. Tuttle, a merchant of Hastings, who claimed, in their own language, to "have chattel mortgages on the whole thing." It further appears from the testimony, that on the afternoon of the 23d of November, the day after Cowles had consented to allow Taylor & McHugh, and Pringle, to take lumber on account of their indebtedness, he executed a chattel mortgage upon all of the lumber in his yard, and upon all the logs in his boom to Tuttle, to secure the payment of his note for two thousand five hundred dollars, that day given for supplies to be furnished during the following winter, to enable him to set men at work to cut saw logs in the pine-ries; and, also, that on the 25th of November he executed another mortgage to the Merchants' National Bank upon the same lumber and logs, to further secure the money which the bank had agreed to let him have in October. At this time his creditors were pressing him, and the institution of proceedings in bankruptcy against him was threatened. Cowles, in answer to their demands, says in his own language, "I am dead broke; I have no means; I can't pay." And also, that he did not think his creditors had better put him into bankruptcy; that his father had a claim of about twenty thousand dollars, which would sweep everything and leave but a small percentage to other creditors.

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Now, are we authorized to declare upon this statement of the case, the first act of bankruptcy established? We think so. We readily agree with counsel that the *intent* to delay and hinder creditors is a question of fact to be proved; but the testimony necessary to establish it need be of no higher order than is required to prove any other fact. All the circumstances attending the transactions of the debtor, his conversations, his acts, his necessities, are to be taken into consideration, and his motive judged of by these. Put to this test, it seems to me there was a manifest design to hinder and delay creditors. We do not dispute the right of a debtor to mortgage his property, or a portion of it, for the purpose of raising money to pay his debts. Such a disposition of his property shows an honest and laudable intention on the part of a debtor to meet his liabilities. Courts always are inclined to sustain such transactions; but the conveyances by Cowles do not fall within that class of cases. They were not given for the purpose of raising means to pay off his importunate creditors, but for the purpose and with the manifest design of so incumbering his available means that they would be delayed and hindered in the collection of their demands. In fact, the president of the Merchants' National Bank says in his testimony, that when he took the mortgage in October he placed the balance of the money due Cowles to his own personal account in the bank, and gave him a due-bill, in order, as he says, that Cowles could say "no" to his creditors who asked for money, and could not use it to pay his debts. Cowles acquiesced in this, and says that when he wanted any of the money he procured the president's check on the bank for the amount.

Again, we find the second charge of bankruptcy true. The debtor cannot escape the conclusion to be drawn from his statements made prior to the last mortgage to the Merchants' National Bank, and immediately after the Tuttle mortgage was given. He told the witness (Fuller) at that time that his father had a claim that would sweep everything if bankruptcy proceedings were instituted against him. He has

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made no effort to explain this statement. It stands admittedly true, and notwithstanding his testimony that he had assets which he estimated worth sixty thousand dollars, we are constrained to believe that he was insolvent at that time. His statement about his father's demands, taken in connection with the evidence of other witnesses as to the value of his assets, establishes clearly his insolvency. There can be no doubt that the mortgage to the Merchants' National Bank, given in November, gave it a preference. The bank held his notes in October, and although a chattel mortgage was given at that time to secure them, Cowles executes this additional security, and must have intended the natural result of his own conduct. The counsel for the debtor relies upon the case of *Curtis et al. vs. Leavitt*, 15 N. Y. Rep. It has no application to the state of facts as we find them here. The banking institution in that case, although embarrassed, had, at the time the trusts were created, assets over and above its liabilities; and the question decided by the court was, that such embarrassments did not create such a state of insolvency as was contemplated by the restraining act which it was charged with violating. Besides, its property mortgaged consisted of choses in action, and creditors could not possibly be hindered or delayed by the mortgage. There are other dissimilarities to the state of facts in this case, which we think unnecessary to consider.

We now come to the charge that, being a *trader*, he has fraudulently suspended, and not resumed payment of his commercial paper within the period of fourteen days. We shall adopt the interpretation given this provision of the act by several of the district judges, namely, that it is unnecessary to show the stoppage of payment to have been fraudulent; suspension of payment and non-resumption within fourteen days is all that is contemplated by that provision. This view of the act presents uniformity of decision, based upon a fair and reasonable construction; and besides, it would seem that congress intended to make a failure to pay commercial paper within fourteen days after stoppage a test of insolvency. We

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have found no American decisions directly upon the point as to what constitutes a trader, but the decisions are numerous under the English bankrupt act of 1825, and are to be regarded as authority with us. The English statute specifies the description of traders who come within the act, and the effect of all the amendments prior to 1825 was to enlarge the classes of persons who, upon correct principles of bankrupt law, should be included within it. (See Introduction to Eden on Bankruptcy.) Under that act the debtor would be regarded a trader.

Our bankrupt act is broader in terms, and excludes no person who should, upon principles of commercial law, be included within the term trader. The commercial definition of a trader is, one who makes it his business to buy merchandise or things ordinarily the subjects of commerce and traffic. The debtor was clearly engaged in that sort of business, and comes strictly within this commercial definition. Upon the whole, therefore, we find the several acts of bankruptcy charged fully established.

* U. S. DISTRICT COURT, S. D. NEW YORK.

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Registers' fees discussed; what are legal, and what unwarranted and improper, determined.

In re JESSE H. ROBINSON.

IN this case questions arose as to the costs, which, on application of the bankrupt, were certified to the judge for his opinion. The following bill of fees was rendered by the register :

No. 7 BEEKMAN STREET, NEW YORK,
In said district, before Mr. James F. Dwight, register in bankruptcy.

REGISTER'S BILL OF COSTS.

1867.

July 21. Examining petition and schedules under special order of this date, and certifying same for adjudication, \$5.
Deposition proving duplicate originals, 65 cents . . \$5 65

In re Jesse H. Robinson.

	2d.	Certified copy adjudication of bankruptcy, fol. 2	. 45
	3d.	Certified copy protection in bankruptcy, 2 fols.	. 45
	4th.	Application for first meeting of creditors	. \$1 00
July 13.	5th.	Certificates of questions to judge concerning publication	. 1 00
" 10.	6th.	Issuing warrant returnable	. 2 00
	7th.	Certified list of creditors, fols. 7	. 95
Sept. 27.	8th.	First meeting of creditors	. 3 00
" 30.	9th.	Order for supplemental warrant, \$1; sup. warrant, \$2; application, \$1	. 4 00
Oct. 22.	10th.	Certified copy mem's first meeting of creditors, fols. 2	. 45
	11th.	Meeting in return of second warrant	. 3 00
Nov. 2.	12th.	Drawing and executing assignment to assignee, meeting with assignee on his acceptance of the trust, and delivering papers to him and taking his receipt	. 5 00
	13th.	Certified copy schedules for assignee, fols. 42, and certificate	. 4 45
" 30.	14th.	One day's service under special order of reference made upon petition for final discharge	. 5 00
	15th.	Order to show cause, made upon this order and certifying copy to clerk	. 1 00
	16th.	Application for second and third meeting of creditors	. 2 00
Dec. 24.	17th.	Deposition of assignee, 2 fols., and oath and certificate	. 65
	18th.	Deposition of bankrupt, 2 folios, and oath and certificate	. 65
	19th.	Service under special order to pass final examination	. 5 00
	20th.	Second and third meetings of creditors	. 6 00
" 26.	21st.	One day's examination and certificate of examination of bankrupt of conformity of bankrupt with the law	. 5 00
	22d.	Certificate and report of final examination and of second and third meetings, 4 folios	. 85
	23d.	Certificate of conformity	. 65
	24th.	Incidental expenses, office, clerk, lights, stationery, &c.	. 10 00
	25th.	Discharge without opposition	. 2 00
The following certified copies of memoranda transmitted to clerk, viz.:			
July 2.	26th.	Of adjudication, 1 copy 2 folios	. 45
" 10.	27th.	Of issuing warrant, 1 copy	. 35
Sept. 13.	28th.	Certificate of question to judge	. 35
" 19.	29th.	Return of certificate and judge's decision	. 35

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Sept. 30.	30th.	Order for supplemental warrant	35
Oct. 1.	31st.	Issuing two warrants	35
" 22.	32d.	Return of second warrant and meeting of creditors	45
" 30.	33d.	Filing P. O. D. Hackell & Alderman	35
Nov. 2.	34th.	Executing deed to assignee	35
" 13.	35th.	Filing P. O. D. Brooks Brothers	35
" 15.	36th.	Receipt of petition and order	35
" 30.	37th.	Of order to show cause	35
Dec. 26.	38th.	Of second and third meetings	35
			<hr/> \$75 05

Upon the taxation of this bill of fees, the following items were stricken out by the register, upon the bankrupt's objection, namely :

Item 9th.	Order for supplemental warrant	\$1 00
" 12th.	Drawing and executing assignment to assignee, &c.	5 00
" 24th.	Incidental expenses, office, clerk, lights, &c.	10 00
		<hr/> \$16 00

The remaining items objected to appear in the opinion of the court.

The following items are unusual, and not performed in the course of an ordinary proceeding in bankruptcy :

Item 5th.	Certificate of question to judge	\$1 00
" 9th.	Supplemental warrant	2 00
" 11th.	Meeting on return of supplemental warrant	3 00
" 16th.	Application for second and third meetings	1 00
" 20th.	Second and third meetings	3 00
		<hr/> \$10 00

BLATCHFORD, J. In this case the register has, on the request of the bankrupt, taxed the items of fees charged by the register against the bankrupt for services rendered by the register in the proceedings in this case. The bankrupt objected before the register to several items, including those hereafter set forth. The register, after hearing the objections, allowed some items and disallowed others. Among those allowed by the register, notwithstanding the objections of the bankrupt, were the following, in respect of which the bankrupt has applied to the court to review the allowance of

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them by the register. The register and the counsel for the bankrupt have been heard by the court in regard to the items so allowed under objection, which are these:

1. Examining schedules and certifying same correct, \$5.
2. Certified copy of adjudication in bankruptcy, 45 cents.
3. Application for first meeting of creditors, \$1.
4. Certified list of creditors for warrant, 95 cents.
5. Supplemental warrant, \$2; application for meeting, \$1.
6. Certified copies schedules for assignee, \$4.45.
7. One day's service under special order of reference upon petition for final discharge, \$5.
8. Order to show cause and certifying copy for clerk, \$1.
9. Application for second and third meetings, \$2.
10. Deposition of assignee on his return, 65 cents.
11. Service under special order to show cause why bankrupt should not be discharged, \$5.
12. Second and third meetings of creditors, \$6.
13. Services, examination of bankrupt and proceedings, and for making certificate of conformity, \$5.
14. Discharge without opposition, \$2.

I proceed to dispose of these items in their order:

Item 1. This is a charge for examining the bankrupt's petition and schedules, and certifying the same to be correct, under General Order No. 7, and Rule No. 4 of this court. General Order No. 7 requires the register to render the service, and Rule No. 4 of this court prescribes formalities to be observed in rendering it. The theory of the charge of \$5 for the service is, that it is allowed by that clause of section 47 of the act which allows "for every day's service, while actually employed under a special order of the court, a sum not exceeding \$5, to be allowed by the court." The item is \$5 for one day's service examining the petition and schedules, and certifying the same to be correct. The register contends that the order of reference (Form No. 4) is a "special order of the court," within the meaning of the clause cited from section 47. The only order under which the register acts, in performing the service in question, is Form No. 4. The point

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involved has been fully and ably examined by Judge Ballard of the Kentucky district (*In re Dean*, N. B. R. quarto, vol. 1, p. 26,) and I entirely concur with him in his decision. He holds that Form No. 4 is not a special order, but is an order required by General Order No. 4, to be entered as of course in every case, and that it requires the register to do nothing which he is not required to do by the act and the general orders. The conclusive view is, that if Form No. 4 is a special order under section 47, and if the register is, therefore, entitled to \$5 for a day's service under it, for examining the petition and schedules, and certifying the same to be correct, there is nothing to prevent the register from claiming \$5 for every day's service for taking any proceeding required by the act in the case, because by Form No. 4 he is authorized to make such adjudication, and take such other proceedings in the case as are required by the act. And not only that, but in addition to such per diem, he can also claim the specific fees allowed to him by section 47, and by General Order No. 30, even though the whole of a given day's service may be only some one of the specific items for which a specific fee is allowed. Another view is, that a service which a register is required to render by General Order No. 7, and by Rule No. 4 of this court, cannot with any propriety be said to be a service in which he is employed under a special order of the court. This item is disallowed.

Item 2. The charge for a certified copy of the adjudication in bankruptcy, furnished to the bankrupt, is warranted by General Order No. 30. The paper is a paper in the proceedings. But as it does not appear that the certificate contained more than one folio, the charge for the certificate must be reduced from twenty-five to fifteen cents. The paper itself contained two folios, and is properly charged at twenty cents, being ten cents for each folio. But General Order No. 30, inadvertently allows twenty-five cents for certifying a copy of a paper, whether the certificate consists of more than one folio or not. When the certificate consists of more than one folio, the charge of twenty-five cents for the certificate is

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proper, but when the certificate consists of one folio or less, the charge for the certificate can be only fifteen cents. By section 10 of the act, the fees to be established by the justices of the supreme court could not exceed the rate of fees then allowed by law for similar services in other proceedings. The fee for a certificate allowed by the fee bill in the act of February 26, 1853, is fifteen cents per folio, and a larger fee is unauthorized. The charge in this item must be reduced
50 to thirty-five cents, and is allowed * at that amount.

The bankrupt claims that the register, inasmuch as he uses Form No. 5, in the shape of a printed blank, in making the copy of the adjudication, and only fills into it the necessary written matter, can charge only for such matter by the folio, and cannot charge by the folio for the printed matter found in Form No. 5, which is contained in the copy. This ground is not tenable. The charge for the copy is allowed by General Order No. 30, at ten cents for each folio of one hundred words, whether the words are written or printed. The register may write them all if he chooses, and if, instead of doing so, he uses a printed form for a portion, that fact does not prevent him from charging for the whole by the folio, the general order not having made any discrimination between a written copy and a printed copy.

Item 3. The charge of \$1 for the application for the first meeting of creditors is claimed to be allowable under that clause of section 47 which allows "for every application for any meeting in any matter under this act, \$1." I am of opinion that this clause refers only to a meeting which is applied for in a substantial sense, such as a meeting of creditors applied for under section 27 or section 28 of the act. The first meeting of creditors is not applied for in any such sense. Section 11 directs that the warrant shall authorize the marshal to give notice of the first meeting of creditors.

The warrant (Form No. 6) requires the marshal to give such notice. No application for such meeting is contemplated or provided for by the act or the general orders, nor is it ever in fact made. It is purely a constructive service. Besides, it

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is covered by the fee of \$2, given for issuing the warrant, which includes all services of the register prior to, and in issuing the warrant, which are not otherwise specially provided for. This item is disallowed.

Item 4. The charge of ninety-five cents for "certified list of creditors for warrant," is for the list inserted in the warrant, when it is issued by the register. This charge is covered by the \$2 allowed for issuing the warrant. It is disallowed.

Item 5. For reasons which were satisfactory to himself, the register issued a supplemental warrant to the marshal in this case. Whether it was a proper case for a supplemental warrant, is not a question before me now. The bankrupt is concluded as to that point by not raising it at the proper stage of the case. Section 42 gives a fee of \$2 "for issuing every warrant." This supplemental warrant was a warrant, and was issued. The fee of \$2 for it is allowed. The fee of \$1 for the application for the meeting of creditors called by the supplemental warrant, is disallowed for the reasons given in disallowing item 3.

Item 6. The item for certified copies of schedules for assignee is allowed. Section 4 of the act requires the register to furnish the assignee with a certified copy of the schedules of creditors and assets filed in each case. These schedules are papers within the meaning of General Order No. 30, and may be charged for at ten cents for each folio for the copies, fifteen cents for each certificate, if one folio or less, and twenty-five cents for each certificate, if more than one folio. The amount must be fixed accordingly.

Item 7. The charge of \$5 for one day's service under special order of reference upon petition for final discharge, is allowed. The order made on a petition for a discharge, so far as it refers it to the register "to make an order to show cause thereon and to sit in chambers on the return of said order," and to certify to the court whether the bankrupt has in all things conformed to his duty under the act, and has conformed to all the requirements of the act, is a special order,

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It requires the register to render services not specifically enjoined on him by the act or the general orders. The \$5 in this item is for the one day's service examining the papers and making the order to show cause.

Item 8. The charge of \$1 for order to show cause and certifying copy for clerk is disallowed. This service is covered by the \$5 allowed in item 7. When the special order of reference on the petition for discharge, authorizing the register to make an order to show cause thereon, comes to the register, the first one day's service which he renders and charges for under item 7 is the making of the order to show cause. The charge of \$1 is sought to be upheld under that clause of General Order No. 30 which allows to the register "for every order made where notice is required to be given, and for certifying copy of the same to the clerk, \$1." But this clause refers only to such an order as is named in General Order No. 8, an order "in any proceeding in which notice is required to be given to either party before the order can be made." The order to show cause made by the register on a petition for a discharge is not such an order.

Item 9. This is a charge of \$2 for application for second and third meetings of creditors. It is reckoned as two applications, one for each meeting, with a charge of \$1 for each application, under that clause of section 47 which allows \$1 for every application for any meeting in any matter under the act. I think these meetings may fairly be regarded as having been applied for to the register, under General Order No. 25, but as there was, and need be, but one application for the two meetings, the charge must be reduced to \$1 in the whole. The new rule made by this court January 22, 1868, provides that hereafter, in cases of orders to show cause made, according to Form No. 51, on petitions of bankrupts for discharges from their debts, no meeting of creditors, except the first, shall be ordered or had, unless some assets have come to the hands of the assignee; but where in any case any assets have come to the hands of the assignee, then the order to show cause shall contain a provision, under General

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Order No. 25, for the holding of the second and third meetings of creditors, and for notices thereof. This rule was made upon the ground that General Order No. 25 does not, when read in connection with sections 27 and 28 of the act, require the second and third meetings of creditors to be held in cases where there are no assets, there being no necessity for either of such meetings unless there are assets to be divided, and neither of such meetings being a necessary preliminary requisite to the discharge of the bankrupt.

Item 10. This is the assignee's return, Form No. 35. The objection taken to this item is the same that is taken to item 2, in respect to the written matter inserted in a printed form. The objection is overruled. The return is a deposition, and the register has a right, under section 47, to charge, for taking it, the fees allowed by law for taking a deposition. Whether the charge of sixty-five cents is the proper amount on this basis, I have not the means of deciding.

Item 11. This charge of \$5 is for one day's service sitting in chambers on the return of the order to show cause. As such, it is allowed. It is a service rendered under the special order of reference made on the petition for a discharge, and is allowable for the reasons set forth in respect to item 7; it is not allowed on any idea that the order to show cause in Form No. 51 is a special order.

Item 12. This charge of \$6 for the second and third meetings of creditors must be reduced to \$3. Section 47 allows \$3 for each day in which a meeting is held, and these meetings were held on one and the same day. The allowance is not for each meeting, but for each day in which any meeting or meetings is or are held.

Item 13. This is a charge of \$5 for one day's service examining the bankrupt and the proceedings, and making a certificate of conformity. It is allowed for the same reasons for which item 7 and item 11 are allowed. It is a service under the special order of reference made on the petition for discharge, which requires the register to certify to the court whether the bankrupt has in all things conformed to his duty

In re Robert C. Rathbone.

under the act, and has in all things conformed to the requirements of the act. In ordinary cases three days' services, and only three, are chargeable under this special order of reference; one day for the examination of papers, and making the order to show cause; one day for sitting in chambers on the return of the order; and one day for finally examining all the papers, and making a certificate of conformity. So far as that order of reference authorizes or requires the register to pass the last examination of the bankrupt, in case there is no opposition, it is not a special order, because he is authorized and required to render that service by section 4 of the act, and Form No. 4, which is a general order.

Item 14. This charge of \$2 for a discharge without opposition, is allowed. It is expressly given to the register by section 47.

The result is that the items objected to, amounting to \$41.50, are allowed at \$26.45.

F. C. Nye, for the bankrupt.

U. S. DISTRICT COURT, S. D. NEW YORK.

The specifications of the grounds of opposition to the discharge of a bankrupt must be distinct, precise, and specific, so that he may be apprised as to what facts he must be prepared to meet and resist.

In re ROBERT C. RATHBONE.

BLATCHFORD, J. A creditor of the bankrupt has filed what purport to be five specifications of the ground of his opposition to the discharge of the bankrupt. They are in substance as follows:

1. That the bankrupt has not set forth in his petition and schedules all his property.

2. That in his examination on oath before the register, he has not, in some material facts, stated the truth respecting his property, which should go to his assignee in bankruptcy.

In re Robert C. Rathbone.

3. That he has been guilty of fraud in delivering to such assignee the property belonging to him.

4. That he has been guilty of fraud in covering, concealing, and distributing his property.

5. That he has been guilty of fraud generally, and of false representations concerning his property, and in its distribution among his creditors, under an assignment made by him in 1854, and of fraud and collusion with the assignee, under that assignment; and that from the time he made that assignment until now he has been guilty of fraudulently conducting his business, through collusive arrangements with others, who keep the bankrupt as a clerk, but really divide with him the profits of the business; and that the bankrupt, through his wife and brother and others to the creditor unknown, has concealed his property from the date of that assignment till now, and that they hold the same for his use and benefit, such conduct being for the purpose of defrauding his creditors named in the schedules annexed to his petition.

These specifications are all of them too vague and general to be triable. They are not at all specific. They point to nothing with any reasonable definiteness. They aver nothing on which an issue can be raised. They do not notify the bankrupt what specific and particular allegations of fact the creditor intends to prove. The only one of them which approaches the character of a proper specification, is that part of the fifth specification which states that the bankrupt is ostensibly a clerk, but really a partner in some business; but this does not state what the business is, or who the copartners are. The specifications of the grounds of opposition to a discharge must, under section *31 of the act, 51 and General Order No. 24, be as specific as the specifications of the grounds for avoiding a discharge after it is granted, required by section 34 of the act. The allegations must be allegations of fact, and must be distinct, precise, and specific, and must not be allegations merely in the language of section 29 of the act, or allegations so general as really not to advise the bankrupt what facts he must be prepared to meet and resist.

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The 4th section of the bankrupt act of 1841 provided that the discharge, when duly granted, should be conclusive evidence of itself in favor of the bankrupt, unless it should be impeached for some fraud or wilful concealment by him of his property, contrary to the act, "on prior reasonable notice specifying in writing such fraud or concealment." In *Brereton v. Hull*, 1 Denio, 75, a discharge in bankruptcy was pleaded. To this plea there was a replication, generally alleging that the defendant was guilty of fraud and of wilful concealment of his property, and purporting to set forth three specifications.

The first specification related to transfers of property for the purpose of preferring certain creditors, but did not describe the property, either as to kind or quantity, or state to whom it was conveyed, or what creditors were preferred. In respect to this specification, the court said, "The specification is nearly in the words of the statute, and is quite too general to inform the defendant what charge he must be prepared to repel on the trial. If the plaintiff knows that there were any unlawful preferences, in contemplation of bankruptcy, he can specify what, in particular, they were. If he has no such knowledge, this is then a mere fishing suit which deserves no encouragement."

The second specification named certain property as having been conveyed in fraud of the act, but did not name the persons or any of them to whom it was conveyed. The court held that this should have been done, and said: "The defendant should be fairly apprised of the proof which he may expect to meet on the trial. If the property was sold by retail or at auction, in small quantities, it would not be necessary to give the names of all the purchasers, and, possibly, the specification would be good without giving any of them. But then the pleading should state the necessity for omitting to give the names." The third specification alleged that the defendant had concealed property of considerable value. This was held bad, because it did not describe the property as to kind or quantity, and did not state how or in what

In re Francis T. Prankard & William C. Prankard.

manner the concealment was effected, or when or in what stage of the proceedings it occurred. The same doctrine substantially was held in *Chadwick v. Starrell*, 27 Maine, 14; *Shepley*, 138, and is approved by this court.

I have had before me, as yet, but three cases of specifications in opposition to discharges under the act of 1867, and in all of them there has been these vague, and general, and insufficient, and fishing specifications. Such a practice is not to be encouraged; and although, in the present case, I shall give to the creditor ten days herefrom to file proper specifications, on the ground that the practice may not have been regarded as settled, yet it must be understood, that hereafter specifications must conform to the views expressed in this decision, and that the time for filing them will not hereafter be enlarged by the court, after the expiration of the time granted by or under General Order No. 24, for doing so.

U. S. DISTRICT COURT, S. D. NEW YORK.

A petition was filed by two partners, one of whom neither resided nor carried on business in the district where the petition was filed: *Held*, that such partner must file his petition where he resided. It appearing further, that a third party had been a partner at the time the partnership debts were contracted, and that the members thereof were bankrupt jointly and individually, the court intimated that no proceedings could be had in the other petition or petitions until the third partner joined or was brought in by proper notice.

In re FRANCIS T. PRANKARD & WILLIAM C. PRANKARD.

I, ISAAC DAYTON, one of the registers of said court in bankruptcy, do hereby certify that, in the course of the proceedings in said cause before me, the following question arose pertinent to said proceedings. The petition having been referred to me by order of this court (Form No. 4), and the same having come before me on the 1st inst., for adjudication of bankruptcy, and it appearing by said petition that Francis

In re Francis T. Prankard & William C. Prankard.

T. Prankard resides in the city of New York, and the petitioner, William C. Prankard, resides in the Eastern District of New York; that they are copartners, and were transacting business in the city of New York as such, at the times mentioned in the schedule marked A, annexed to said petition, being in the year of 1860, the time when the debts set forth in said petition were alleged to have been contracted.

And it further appearing by the schedules annexed to said petition, that there are no individual debts or assets of either of said petitioners, the register is of opinion that this court has no jurisdiction upon said petition to adjudicate the said petitioner, William C. Prankard, who resides in the Eastern District of New York, a bankrupt, the petition not showing that he resides or is now doing business in the Southern District of New York; and that section 36 of the bankrupt act, which provides that in case of bankrupt partner, if such copartners reside in different districts, the court in which the petition is first filed shall retain exclusive jurisdiction of the case, gives this court no jurisdiction to adjudicate the petitioner, William C. Prankard, a bankrupt, or any power or authority over his person until he shall have filed his petition for adjudication of bankruptcy in the district where he resides.

N. A. Chedsey, the counsel for the petitioners, insists, that where both the petitioners join in the petition, and there are no individual debts, and all the copartnership indebtedness was contracted in this city, and one of the petitioners resides in the city of New York, which facts appear in this case, it is necessary for the other petitioner to file his petition in the district where he resides, and that this court has no jurisdiction, as the case now stands, to adjudicate both petitioners bankrupts, and requests that the question be certified.

Respectfully submitted,

ISAAC DAYTON, *Register.*

BLATCHFORD, J. The register is correct. William C. Prankard must file his petition in the Eastern District of New York.

In re Josiah Carpenter.

I have referred to the petition on file in this case, and observe that it states that John S. Marshall was a copartner with the petitioners when the copartnership debts, set forth in schedule A, were contracted, and that the members of the copartnership are bankrupts, jointly and individually. On this state of facts, no proceedings can be had on the petition or petitions of the Prankards, unless Marshall joins with them, until he is brought in by a notice and proceedings under General Order No. 18.

The clerk will certify this decision to the register, Isaac Dayton, Esq.

February 13, 1868.

U. S. DISTRICT COURT, S. D. NEW YORK.

A bankrupt who fails to attend on the adjourned day of his examination before the register, by reason of sickness, cannot be punished for contempt of court.

In re JOSIAH CARPENTER.

THE following case involving a question of contempt was certified to the judge by Register Fitch. The register's certificate is, to say the least, curious, but it is inserted in pursuance of our custom, to make our reports full and complete. — ED.

I, John Fitch, the register in charge of this cause, certify to his honor, the district judge,

That the bankrupt, Josiah Carpenter, is now under examination as a bankrupt, and has been for some time; that the bankrupt is attended by E. J. McGeon and Theodore F. Sanxey, as his counsel; that the creditor is attended by B. F. Sawyer and Henry C. Sawyer; that the attorneys in this cause have evinced a most unpleasant and uncourteous feeling towards each other, and the proceedings are conducted as between each other with a bitterness of feeling not usually indulged in; that the feeling evinced on the part of the attorneys for the creditors towards the bankrupt is of the

In re Josiah Carpenter.

most unpleasant kind ; that the bankrupt has attended in obedience to an order, and been examined to a considerable extent, and much testimony has been taken ; that the examination has in part disclosed that the wife of the bankrupt has both real and personal property ; that as to the question as to the wife of the bankrupt holding property separate and independent of her husband, which cannot be taken by the assignee under the bankrupt law, in the opinion of the register, neither of the attorneys are ready to present the case to the court in a manner sufficiently plain to bring up the question so that it can be certified to the judge in a clear and concise manner, and the examination is proceeding as to other points ; that the last examination was had on the 4th day of February, A. D. 1868, and by consent adjourned to the 7th day of February, A. D. 1868, at eleven o'clock A. M., on account of the petitioner having to have one of his great toe-nails, which was growing into the flesh, cut out by a physician ; that on the 7th day of February, 1868, the said petitioner did not attend in person, but one of his attorneys appeared for him, and produced a letter from the said petitioner, stating that he was unable to put his boot on, owing to the condition of his toe ; the register adjourned the cause, on motion of petitioner's attorney, one day, to enable the petitioner to procure a certificate from his physician as to the condition of his foot ; that Henry C. Sawyer, with a witness, soon after called at the office of the register and said they had been to the house of the said petitioner, and the servant told them Mr. Carpenter was out, had gone down town, or words to that effect ; the register told said Sawyer to make an affidavit to that effect, and appear with it on the adjourned day.

The register was of the opinion, from the appearance of the petitioner on the 4th day of February, 1868, that he was really suffering ; that there must be some mistake about the matter ; and that the bankrupt would not intentionally deceive the court. Accordingly, I went to the house of the petitioner, and asked for the said Carpenter. He came limp-

In re Josiah Carpenter.

ing slowly down stairs. I then examined his foot, and found that the letter as to the condition of his foot was not in the least exaggerated. The nail of his great toe had been mostly cut out; that it was painful to a great degree. I examined the foot carefully, and the said Carpenter, in my opinion, told the truth, and was, in fact, as he had represented. On Saturday, February 8, 1868, at the hour of adjournment, the creditor appeared by H. C. Sawyer, and the petitioner by E. J. McGeon. H. C. Sawyer proposed to file the affidavits, and asked for a certificate to the district judge, "asking for a commitment of the bankrupt for contempt." The register explained the impropriety of such an act. The said Sawyer then said he would complete his affidavit, and then left. The register told him he would hold the cause open for him to do so. Soon thereafter B. F. Sawyer, the father of H. C. Sawyer, came in, with his son and another attorney in the cause, who represents another creditor. I explained to B. F. Sawyer the condition of the bankrupt, and that it would be unsafe for him to venture out for a few days, with which statement the said B. F. Sawyer seemed perfectly satisfied; he would himself conduct the examination, in place of his son; agreed to have the cause adjourned to the 14th day of February, * 1868, at twelve M., and in future 52 there should be no more unpleasantness between himself and the petitioner's attorneys, and that he would proceed to close up the examination with as little delay as possible.

The register certifies to the court, that much of the unpleasantness exhibited as between the attorneys in this cause has been caused by the severe and uncalled for remarks of the attorney (H. C. Sawyer) for the creditor, in relation to the bankrupt; that the register has checked remarks of all the attorneys as far as he could, but not having the power to commit for improper conduct on the part of an attorney, could only resort to moral force, and the examination has proceeded as well as could reasonably be expected, considering the ill-feeling between the parties.

In re Josiah Carpenter.

The register certifies, that the practice of allowing the petitioner counsel, under the rule in the Patterson case, is in effect the examination of the counsel, instead of the petitioner; as in this case, the bankrupt has two good lawyers as counsel, who shape and frame nearly all of his material answers, and most tenaciously endeavor to prevent the attorneys for the creditors from obtaining answers to their questions which would show the facts sought to be proved, and hinder and delay the proceedings in the cause by objections, some of which are, but most of them are not material.

The register further certifies, that the bankrupt has shown the utmost respect and obedience to the register — I think, in each instance answering, as advised by counsel, the questions required by the register to be answered — and has attended, on the various times for examination, with all due diligence, and that the register is satisfied that the condition of his foot was a sufficient reason for non-attendance on the 7th of February, 1868, as his counsel was present.

The register deems it his duty in this case to certify to the district judge, that the petitioner has been for a long time involved in many lawsuits; that the aforementioned lawyers have brought some of them, and that as between them and the bankrupt there exists an unpleasant feeling — unusually bitter; that up to the 8th day of February, 1868, the examinations have proceeded as fast as the business engagements of four lawyers would admit of; that if the proposition of B. F. Sawyer, to which the counsel for the petitioner assents, can be carried out, namely, that B. F. Sawyer act alone for the creditor, Henry Bow, instead of H. C. Sawyer, assisting him, and the petitioner appearing by one counsel, the examination can proceed harmoniously as between the said B. F. Sawyer and the attorney for the petitioner, and the examination soon be closed.

JOHN FITCH, *Register.*

BLATCHFORD, J. I can perceive nothing in this case on which I am called upon to pass, except the question whether

In re William Okell.

the bankrupt has done anything to warrant a proceeding against him for contempt. I decide that he has not.

The clerk will certify this decision to the register, John Fitch, Esq.

February 12, 1868.

U. S. DISTRICT COURT, S. D. NEW YORK.

A bankrupt is not entitled to witness fees on his appearance for examination before the register.

In re WILLIAM OKELL.

ON the 18th day of January, 1868, upon the application of Charles Walke, a creditor of the above named bankrupt, I issued an order for the examination of said bankrupt, returnable at my office at White Plains, New York, on the 5th day of February, 1868, at ten A. M.

On the return day of said order, Mr. Conable appeared as attorney for said creditor, and Mr. Taggart as attorney for said bankrupt. Mr. Taggart, in behalf of said bankrupt, insisted that said bankrupt was entitled to his fees as a witness. Mr. Conable, on the other hand, insisted that he was bound to appear and submit to an examination, pursuant to the order, and was not entitled to any fees.

The undersigned decided that said bankrupt was bound to appear and submit to such examination pursuant to said order, without fees. Whereupon, at the request of the counsel for said bankrupt that the same should be certified to the judge for his opinion thereon, the question is submitted as to whether said bankrupt, who is required by an order of the court to appear before the register and submit to an examination, is entitled, before being examined, to be paid witness' fees.

The undersigned is of opinion that said bankrupt is not entitled to such fees. Section 26 of the bankrupt act provides, "that the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any applica-

In re Alfred Beardsley.

tion, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath," &c.

I find no provision in the act allowing the bankrupt fees as a witness in such cases. He may be required to submit to an examination without the application of a creditor; in such case it is difficult to see from whom he could obtain fees as a witness.

The bankrupt applies to the court to be discharged from all his liabilities, and it would seem to the undersigned but reasonable that he should attend at the instance of a creditor whose debt is to be swept away by the discharge, and submit to an examination as to his property. All of which is respectfully submitted. ODLE CLOSE, *Register*.

BLATCHFORD, J. The register was correct in his decision.



U. S. DISTRICT COURT, S. D. NEW YORK.

A specification that the bankrupt has falsely set forth in his petition and schedules, that he had no property, is defective, unless it specifies what property he had. Specifications alleging concealment or omissions from the schedules are defective if they do not allege that these acts were wilful, fraudulent, or negligent.

In re ALFRED BEARDSLEY.

BLATCHFORD, J. The first, second, fourth, sixth, and seventh specifications filed as grounds of opposition to the discharge of the bankrupt, in this case, are altogether too vague and general to be triable.

The first is, that the bankrupt has falsely set forth in his petition and schedules that he had no property.

It ought to specify what property he had.

The second is, that he had property rights and choses in action at the time of filing his petition. It should specify the property.

The fourth is, that he has concealed and covered up his

In re Alfred Beardsley.

property, for the purpose of defrauding his creditors existing at the time of filing his petition. Unless it means all his property, it should specify what property: and if it means all his property, the time, place, manner, and circumstances of the concealing and covering up should be specified.

The sixth is, that he has not set forth all his property in the schedules filed with his petition, and that the schedules are false in that particular, and that he had divers kinds of personal property, besides that at the place named in the third and fifth specifications. This is too general. It should specify what the omitted property was.

The seventh is, that he has omitted to set forth all the debts owing by him in the schedules filed with his petition. It should specify the debts omitted.

The first, second, sixth, and seventh are all of them open to the further objection, that they do not allege that the omissions referred to in them were wilful, fraudulent, or negligent. This is necessary under section 29 of the act.

The eighth is, that the bankrupt omitted to set forth a debt owing by him to Hervey G. Law, of about \$2,000, resting in account, and which was not outlawed. This specification is bad, for the reason that it does not aver that the omission was wilful, fraudulent, or negligent.

The third is, that "said Beardsley had an interest in the property in, and the business conducted at, the saloon at 36 Liberty Street, city of New York, at the time of making and filing said petition, of the value of \$3,000, and the said business was and is carried on for his sole benefit.

The fifth is, that "the business at said saloon is pretended to be conducted in the name of one Pope, but really for the benefit of said Beardsley, with intent to defraud said creditors," that is, creditors existing at the time of filing his petition. Although the third, standing by itself, might be open to the objection that it does not aver any wilful, fraudulent, or negligent omission by the bankrupt, in respect to the property referred to, yet I think the third and fifth, taken

Amendment to Rule 16.

in connection with each other and with the petition and schedules, present triable matters.

The third must be read in connection with the fifth, and the omissions and acts referred to in them must be regarded as being averred to have been made and done with intent to defraud creditors existing at the time of filing the petition, and therefore fraudulently, within the provisions of section 29.

A reference is ordered to Register Allen, the register who has had charge of the case, in case either party desires to take any testimony in addition to what has already been taken, to take such testimony in respect solely to the matters set forth in the third and fifth specifications, and report it to the court.

On the coming in of his report, the case can be brought on for hearing before the court.

* U. S. DISTRICT COURT, S. D. NEW YORK.

Amendment to Rule 16 (*in Judge Blatchford's court only*).

RULE 16 of this court in bankruptcy is hereby amended so as to read as follows :

“ All questions for trial or hearing, under sections 31 and 34 of the act, and all questions under section 41 of the act which are not ordered to be tried by a jury, shall be brought on upon testimony taken before a register, a commissioner, or a referee, and shall be tried or heard by the court, and will be so tried or heard on any Saturday in term, at a stated session of the court, on four days' notice of trial or hearing, to be served by either party upon the other party, and upon the clerk. and a separate calendar of the same shall be made by the clerk for every Saturday in term, on which the cases shall be arranged in the order in which the same are numbered, according to General Order No. 1.

In re Charles G. Patterson.

Witness the Honorable Samuel Blatchford, judge of the said court, and the seal thereof, in the city of New York, this 21st day of February, A. D. 1868.

[L. S.]

GEO. F. BETTS, *Clerk.*

U. S. DISTRICT COURT, S. D. NEW YORK.

A debt created by fraud, in which judgment has been recovered, is not affected by a discharge in bankruptcy; hence the sheriff will not be enjoined from an arrest of the bankrupt in an execution issued on such judgment.

In re CHARLES G. PATTERSON.

BLATCHFORD, J. On the 8th of November, 1866, one Shepard recovered a judgment against the bankrupt in the superior court of the city of New York, for \$815.99, on his default for want of an answer, the summons and complaint in the action having been served on him personally on the 8th of May, 1866, in the city of New York. The complaint set forth that, on the 9th of April, 1858, Shepard advanced to the bankrupt \$500, for the express purpose of buying and paying for some goods to be shipped to another person, and the bankrupt received that sum from Shepard in a fiduciary capacity, as the agent of Shepard, to buy, pay for, and ship the goods, and agreed to collect the bill for the goods, and refund the money to Shepard; and that the bankrupt did not use the money for that purpose, but fraudulently misapplied it, and had never refunded it. On the 25th of June, 1867, the bankrupt filed his petition in bankruptcy, and was adjudicated a bankrupt on the 12th of September, 1867. He now represents to the court, that, on the 29th of January, 1868, Shepard issued to the sheriff of the city and county of New York, an execution on said judgment, commanding him to arrest the bankrupt and commit him to jail, until he shall pay the judgment or be discharged according to law,

In re Charles G. Patterson.

and that the execution is in the hands of the sheriff, and he is about to arrest the bankrupt on it. On these facts, the bankrupt asks this court to enjoin the sheriff from arresting the bankrupt on the execution during the pendency of the proceedings in bankruptcy.

It is claimed, on the part of the bankrupt, that the judgment in question is a debt which will be discharged by a discharge under the act; that the original cause of action was merged in the judgment; that the judgment is now the only debt; that it cannot be said, under section 33 of the act, that the debt was created by fraud, because the original claim, though created by fraud, was extinguished by the judgment, and the fraud disappeared when the judgment was obtained; that the judgment alone, and not the claim created by fraud, is provable under the act; that as the judgment is provable, a discharge will discharge it; that, therefore, the bankrupt is, by the last clause of section 26, exempt from arrest on the judgment during the pendency of the proceedings in bankruptcy; and that, under section 21, the court can enjoin an execution on the judgment.

I cannot assent to these views. The question as to whether the debt which is represented by the judgment was created by the fraud of the bankrupt, I regard as concluded by the judgment. It was recovered in a court of competent jurisdiction, on the personal service of a complaint setting forth all the facts making up the fraud.

The question is, therefore, *res adjudicata* as between the parties to the judgment, who are the same parties now before this court.

The only other question is, whether the debt is one excepted by section 33 of the act from the operation of a discharge. That section provides that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any other fiduciary capacity, shall be discharged under this act." It is claimed by the bankrupt that the debt in this case being in the shape of a judgment, this court cannot, in applying the 33d sec-

In re Charles G. Patterson.

tion, go behind the judgment to see whether the claim on which the judgment was recovered was created by fraud; that the judgment, which is now the only debt, was created by the claim, and not by the fraud, and that though the judgment was created by the claim, and the claim by the fraud, yet the judgment was not created by the fraud. This view is unsound.

Wherever the debt, no matter whether it be in the shape of a judgment or in any other form, was created by fraud, had its root and origin in fraud, there it is not to be discharged. To hold that the recovery of a judgment, in an action where the gravamen of the complaint is fraud, condones that very fraud, by so merging the original claim that the judgment cannot be said to be a debt created by the fraud set out in the complaint as the ground for recovering the judgment, would fritter away entirely the good sense and plain intention of the 33d section.

The case of *Bangs v. Watson*, 9 Gray, 211, cited to sustain this view, does not, in my judgment, support it, and I have been referred to no case which leads to any such conclusion.

The debt in this case not being one to be affected by a discharge, the bankrupt is not exempt from arrest upon it, and the application is denied.

Sanford, Le Baron & Porter, for the bankrupt; *Elliott F. Shepard*, for the creditor.

February 17, 1868.

In re Nathan A. Son.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where the allegations in specifications filed in opposition to the bankrupt's discharge are too vague and indefinite to be triable, the case stands as though there was no opposition, and no specifications filed, and if the bankrupt has in all things conformed to his duty under the act, a discharge must be granted to him.

No second meeting of creditors under section 27, and no third or other meeting under section 28 of the bankrupt act, ought to be called, or requested by an assignee, unless there be moneys in his hands for a dividend.

In re NATHAN A. SON.

BLATCHFORD, J. In this case, a creditor has filed five specifications of the grounds of his opposition to the discharge of the bankrupt. They are none of them sufficiently specific to be triable. They are all of them so general and vague that it is impossible for the court or the bankrupt to ascertain from them what specific acts or omissions are relied on as grounds for withholding a discharge. They are as follows:

First. That the bankrupt has concealed part of his effects, and his books relating thereto, and has not delivered to the assignee all the property belonging to him at the time of presenting his petition, with intent to defraud his creditors.

Second. That since the passage of the act, he has made fraudulent transfers of his property, and has lost portions of his property in gaming, and has admitted false and fictitious debts against his estate.

Third. That he has not, subsequently to the passage of the act, kept proper books of account.

Fourth. That he has, in contemplation of becoming a bankrupt, made transfers for the purpose of preferring creditors, and for the purpose of preventing his property from coming into the hands of his assignee, or of being distributed in satisfaction of his debts.

Fifth. That he has been guilty of fraud in other respects, contrary to the true intent of the act, and has, since its passage, mutilated his books or securities.

In re Nathan A. Son.

Nothing could well be more general than these allegations. They are merely the language of * section 59 29 of the act. The case stands as if there were no opposition to the discharge, and no specifications filed, and it appearing that the bankrupt has in all things conformed to his duty under the act, a discharge is granted to him.

I perceive, from the papers in this case, that the order to show cause against a discharge, made by the register December 30, 1867, did not contain a provision for the holding of the second and third meetings of creditors, and for giving notice thereof. The original petition in bankruptcy shows no assets except the wearing apparel of the bankrupt, and the petition for discharge, filed on the 26th of December, 1867, stated that no assets had come to the hands of the assignee. On the 3d of January, 1868, the assignee, acting under section 27 of the act, presented a request to the register, according to Form No. 28, to order the second general meeting of the creditors of the bankrupt, and the register, on the 4th of January, 1868, made an order in the form of the order of Form No. 28, ordering such second general meeting to be held at the same time and place fixed for the hearing on the application for a discharge, and directing notices of such meeting to be sent to creditors and to be published. They were sent and published, and the register, certifies that such second meeting of creditors was held, and that the assignee then and there made due return according to Form No. 35, that no assets had come to his hands, and the deposition of the assignee to that effect, sworn to before the register on the day appointed for the hearing on the application for discharge, and for such second general meeting, is among the papers.

The order for the second meeting of creditors was made before the promulgation, by this court, of the rule of January 23, 1868, directing that in case of orders to show cause, made according to Form No. 51 on petitions for discharges, no meeting of creditors except the first shall be ordered or had, unless some assets shall have come to the hands of the

In re Sampson D. Bridgman.

assignee. Why the special request by the assignee was made in this case, or why the third meeting of creditors was not called as well as the second, does not appear.

No second meeting of creditors under section 27, and no third or other meeting under section 28, ought to be called, and no request for any such meeting ought to be made by an assignee, unless he has in his hands some moneys out of which a dividend can be made; otherwise the whole proceeding is a useless expense and formality. It is not a prerequisite to the discharge of the bankrupt, and no creditor can in any way be benefited by it.

S. E. Swain, for the bankrupt; *Merchant, Conable & Elliott*, for the creditor.

February 15, 1868.



U. S. DISTRICT COURT, S. D. GEORGIA.

A creditor who has a lien, either specific or general, must disclose its particular character, that it may legally, and according to its priority, be ascertained and liquidated.

In re SAMPSON D. BRIDGMAN.

To the Hon. JOHN ERSKINE, judge of the district court aforesaid:

SIR, — I, the undersigned, having been designated by the court as the register in bankruptcy before whom the proceedings in the above matter of the bankruptcy of Sampson D. Bridgman, are to be had, do hereby certify, that in the due course of such proceedings, the following questions, pertinent to the same, arose, and were stated and agreed to by Herbert Fielder, Esq., counsel for the bankrupt, and by Eugenius S. Douglass, Esq., who appeared as counsel for Demetrius A. Cochran, one of the creditors of said bankrupt.

The same creditor proposed to prove, under Form No. 21, general orders supreme court of the United States, a debt

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against the bankrupt, which was secured by a mortgage upon certain real and personal property of the bankrupt, when the following questions arose :

First. Whether the said creditor should be allowed to prove the whole or any part of his debt without the mortgaged property being sold or released as provided by section 20 of the bankrupt act.

Second. Whether a deposition in writing, on oath, setting forth " the demand, the consideration therefor, the securities thereof," &c., as provided in section 22 of the act, is such proving of the debt as is not to be allowed by section 20, without the mortgaged property being sold or released and delivered up.

And the said parties requested that the same should be certified to your honor for your opinion thereon.

F. S. HESSELTINE,
Register in bankruptcy for said district.

OPINION OF THE REGISTER.

These questions arise from a seeming conflict between sections 20 and 22 of the bankrupt act. Section 22 seems to require what section 20 says shall not be allowed.

It is fair to presume that no such conflict existed in the minds of the framers of the law, and wiser to seek to reconcile these apparently antagonistic sections, by endeavoring to ascertain the intentions and objects sought by their authors, than hastily to cast out one or the other of them.

After much consideration I have come to the conclusion that section 20 was inserted in the act to provide that a creditor holding securities of less value than his debt might become a sharer in the *general fund or assets* of the bankrupt, for the excess of his debt over the value of his securities, to be ascertained as the court may order ; or might, by the surrender of his securities, become a participator in said fund for the whole amount of his claim ; also to provide that,

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where the securities held exceed in value the amount of the debt, the creditor might, by paying to the assignee such excess, take the property in satisfaction of his claim, or by not paying such excess look to his mortgage or lien on the property alone to pay his debt, in which case the assignee will sell the property subject to the mortgage or lien.

In other words, the object of this section was to prevent creditors holding securities from keeping back out of the assets of the bankrupt the property so held; and at the same time coming in to prove as *general creditors* for the whole amount of their debts, and thus sharing *pro rata* with the other creditors. I use the expression "proving as general creditors" to distinguish those who, holding no security, prove for their whole claim, from those who, by a "deposition in writing on oath," or "solemn affirmation," declare the amount due to them from the bankrupt, and what property or securities they hold to secure the payment of their debt.

That the latter creditor shall not prove his debt like the former, and be "admitted as a creditor" to participate in the division of the *general fund*, is set forth in the 20th section. That such secured creditor, desiring to share in the assets of the bankrupt, shall make oath to the amount due him, and whatever securities he holds therefor, is plainly demanded by section 22, and the justices of the supreme court have framed Forms 21 and 25 for this kind of proof.

The reason for this is not obscure. That the court may know such creditors, they must appear before it by proving their claims; and the court by such proof must be instructed concerning the securities held in order to decide how it will deal with them, and to do justice as between the secured and the general creditors.

The effect of this proof of claim by a creditor holding securities as required in section 22, differs from that of an unsecured creditor in this: the latter at once steps into the column of general creditors, who are to be paid out of the assets of the bankrupt *pro rata* according to the amount of

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their claims; while the former or secured creditor halts a while to surrender his security or have its value determined as the court may direct; then becomes a general creditor, or sharer in the bankrupt's assets, for the whole or the balance of his debt, according as he has surrendered his securities or had them valued by order of the court.

In brief, my judgment is, that a secured creditor who desires to have his demand against the estate of the bankrupt allowed, and to participate in the assets, must prove his claims as required by section 22 under Form 21 of the general orders, and that such creditor who does not thus prove his claim is to be considered as standing alone without the court, looking only to what he has in his hands to satisfy his debt; if he has more than belongs to him — than the amount of his claim — the court may order the property sold, subject to his lien or mortgage, and pay the proceeds to the creditors who have proved their claims.

F. S. HESSELTINE, *Register.*

ERSKINE, J. Every creditor, secured or unsecured, of the bankrupt, is a defendant in the proceedings, and if a creditor has a lien, either specific or general, and he wishes to protect it, he must disclose its particular character, that it may legally, and according to its priority or dignity, be ascertained and liquidated.

The judgment of Mr. Register Hesseltine is approved.

The clerk of the United States court, southern district, will certify this opinion to Mr. Hesseltine.

In re Edward P. Tanner.

U. S. DISTRICT COURT, MASSACHUSETTS.

A bankrupt under examination has no right to consult with his attorney before answering, except when the examining magistrate shall see good cause for allowing it.

The attorney may attend and object to improper questions.

In re EDWARD P. TANNER.

LOWELL, J. The register, by agreement of the parties, has certified the question whether a bankrupt upon his examination under section 26 has a right to answer by the mouth of his attorney. The law at section 26 provides for an examination of the bankrupt in writing, as to all matters concerning his trade dealings, debts, property, &c. It is plain, upon the whole tenor of the section, that the examination may be had before the court or before a register, and that the debtor is to be personally present, and to make answer substantially like a witness, and not merely to have interrogatories filed or propounded after the manner adopted in equity and admiralty in certain cases. Whether the requirement that it shall be in writing, means that the questions shall always be in writing, if required by either party, I do not now decide, but I do not think it is intended that the bankrupt himself, or his attorney, shall write the answers, but merely that the deposition shall be reduced to writing and signed by the bankrupt.

60 * Since the examination may extend to the bankrupt's whole business life, and may involve large interests of himself and his family, and of other persons who have dealt with him, he should have every proper facility for refreshing his recollection and for making true and careful answer. He may need to consult books and papers, and sometimes, no doubt, to consult counsel, but it seems to me impossible to lay down any general or peremptory rule of law governing such consultations.

In an early case under the insolvent law of Massachusetts, the supreme judicial court is said to have held that the in-

In re Edward P. Tanner.

solvent is absolutely entitled to this privilege. The case is very briefly reported, and without reasons given, but it has been accepted and acted upon ever since. *Ex parte Winsor*, 8 Law Reporter, 514. The practice which has followed this adjudication has been, as I believe the bar will generally concede, unfavorable to the ascertainment of the truth in these investigations, by reason of the great labor and delay of proceeding in that mode, and there is some reason to believe that if the question were new, the same court might now decide it differently; for, in *Peabody v. Harmon*, 3 Gray, 113, they refused this privilege to a creditor under examination in support of his debt, and many of the reasons for the decision apply with great force to all examinations; and the rule there laid down, that such matters must be left to the judgment of the examining magistrate, appears to me to be the true one. It is not to be supposed that a register will deny the bankrupt, or a witness, such reasonable opportunity to see his books and papers, and to consult concerning his rights, as will enable him to answer understandingly, and with all proper reservations, the questions that may be asked him. In England, Lord Chancellor Hardwicke refused to make a peremptory order in a similar case, but recommended that the petitioner (a woman) should be allowed the privilege. *Ex parte Parsons*, 1 Atk. 204; and see *Ex parte Bland*, Ib. 205. And such appears to have remained the rule of practice there. 1 Christian Bankruptcy Law, 385; 1 Mont. & Ayr, B. L. 385 (2d ed.). I do not say that on a motion to commit for not answering, or in some other mode, the judgment of the register might not, in some cases, be received; but that there is no general rule of law to be laid down upon the subject, and that, as a matter of practice, it is highly inconvenient that one should be adopted which should tend to mischievous delay without any corresponding advantage. The questions to a bankrupt are usually concerning matters of fact, and, in the vast majority of cases, involve nothing requiring advice or consultation; and the presence of counsel with the right to object to improper

In re William A. Walker.

questions, and to uphold the rights of the bankrupt in substantially the same manner that he would do if his client were called on the stand as a witness in his own cause in any other court, and with the further reserved right to advise with him concerning his answers, when the register can see cause therefor, meets, as it seems to me, all the requirements of justice in this regard.

Certificate to the register accordingly.

U. S. DISTRICT COURT, MASSACHUSETTS.

A bankrupt arrested and imprisoned before the proceedings in bankruptcy have commenced, cannot be released by the court upon a petition for a writ of *habeas corpus*

In re WILLIAM A. WALKER, Petitioner for a writ of habeas corpus.

THIS was a petition for a writ of *habeas corpus* to obtain the release of William A. Walker, a bankrupt. The petitioner was arrested on mesne process on the 15th of January last, in an action of tort brought by James S. Wiggin, and was committed to jail in Boston. He went into bankruptcy on the 1st of February, and sought in the petition a release from imprisonment under the bankrupt act. It was contended on the part of the petitioner that the court had power to relieve the debtor under the 26th section of the law and the 27th Rule, for the reason that the petitioner had no remedy under the state law or other ways, and if refused he must remain in jail until relieved by the creditor. The creditor contended that the authority given to the court applied only to cases where the arrest was made after the pleadings in bankruptcy were commenced.

Judge Lowell said that he had had a similar case before, and had refused the petition and had remanded the prisoner. The statute does not apply to a case where the arrest was made before the proceedings in bankruptcy had commenced.

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He was sorry it was so, and did not see the difference, nor did he know of any system, either English or American, that did apply. The creditor has his election to come in and prove or not; if he is satisfied the debtor will not pay, he need not prove. The rule is clearer than the statute. The third clause of the rule is simply to find out whether there is, in fact, any debt or not; but this is only where the arrest is made after the petition in bankruptcy. He thought the court must have the power to find out, in a summary way, for the purposes of discharge under the arrest, whether in fact there is a debt or not, and if so, whether the discharge would be a bar, but this only in cases where the arrest is after the bankruptcy. He had no doubt but that the claim was provable, that it was a debt and the amount was fixed, but on the whole did not consider that the law gave him authority to discharge the prisoner.

U. S. DISTRICT COURT, NEW JERSEY.

A bankrupt cannot be examined as to property acquired or business done after the date of filing his petition in bankruptcy, provided he states that the same has no connection with, or reference to his estate or business prior to said date. The register has no power to decide on the competency, materiality, or relevancy of any question, and has, therefore, no power to exclude or overrule any question.

The bankrupt, under the advice of counsel, must take the risk of deciding whether he will answer or not.

If the creditor chooses, he can, upon said refusal, apply to the district judge, to punish the party as for contempt of court, and upon said application, the said judge will decide whether or not the question is a proper one.

In re ISAAC ROSENFELD, JR.

Leon Abbett, attorney for bankrupt.

Thos. N. M'Cartee & S. Stern, attorneys for creditors.

At the examination before the register, Thos. D. Hoxey, Esq., at Paterson, the following questions were asked:

Q. Have you any interest, direct or indirect, with any

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other business or concern in the city of New York, or elsewhere?

A. None whatever that has not originated since my filing my petition in bankruptcy.

Q. Does your answer mean to imply that since the filing of your petition in bankruptcy, you have acquired an interest, direct or indirect, in any business transactions whatsoever?

A. Certainly, sir.

Q. What is the nature and character of that interest, and whence does it arise?

A. Buying and selling stocks and gold on account, and with friends who have supplied me with means, and others who have opened me a limited credit, all of which occurred since the filing of my petition in bankruptcy, and without any reference whatsoever to any connection or property of previous date.

Q. With what firm, if any, are you at present connected, or are your transactions made by you, individually?

Leon Abbett, Esq., attorney for bankrupt, objected to this question, and under his advice bankrupt refused to answer the same. Written briefs were submitted on the part of the bankrupt and his creditors, and the register held that the question was improper, and wrote the following opinion which was submitted to Judge Field, district judge of New Jersey.

OPINION OF THE REGISTER.

In overruling the question, I was guided by, and but followed the decision of Judge Blatchford of the Southern District of New York, in the *Case of Charles G. Patterson*, in bankruptcy (Sup. N. B. R. xxvii.), the effect of which clearly was, that only the property of the bankrupt at the time of filing his petition in bankruptcy, could pass to the assignee, and from the examination of the bankrupt act, upon the following points:

The 26th section of the act gives the power to examine the bankrupt relative "to the disposal or condition of his property," to his trade and dealings with others, and his

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accounts concerning the same, and to all matters concerning his property and estate.

By the words "his property and estate," I think, can only be included the property of the bankrupt in his possession and control at the time of filing his petition in bankruptcy. The question overruled succeeded a full and searching examination of the bankrupt, and the answer to the question preceding it fully disclaims any and all connection of his present property and business with his estate passing to the assignee at the time of filing his petition. This question was unnecessary for any other purpose than that of holding the estate since filing his petition by the bankrupt. If the property of the bankrupt, after filing his petition, does not pass to the assignee of the bankrupt, then *this question, asked for this purpose*, was illegal, and could only lead to an idle protraction of his examination. It would uncover and lay open the private affairs of the bankrupt, in which the old creditors of the bankrupt could have no interest, without aiding in any way in impeaching the former testimony of the bankrupt, or adding to the estate of the bankrupt to be distributed among his creditors under the bankruptcy.

Again, the 14th section of the act requires that the deed of assignment made by the register to the assignee of the bankrupt's estate, made, perhaps, months after the filing of the petition or adjudication of bankruptcy, shall relate back to the commencement of proceedings in bankruptcy, and vest the property of the bankrupt at the time in the assignee.

Form No. 18, prescribed by the supreme court in pursuance of this section, sustains this view of the case.

Again, the 34th section of the act only releases the bankrupt from all claims, liabilities, and demands which are or might have been proved against the estate of the bankrupt, while the 19th section of the act limits the proof of debts against him to all debts due and payable from the bankrupt at the time of adjudication of bankruptcy, and debts at that time contracted but not yet due, with rebate of interest for the unexpired time. In short, the 19th section prescribes that

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the bankrupt shall be released from only those debts that could be proved, that were owing or contracted at the time of adjudication of bankruptcy. If the law should admit of the construction claimed by counsel of the creditors, the law would be one of great injustice, as it would take all the estate of the bankrupt at the time of his discharge for only

those creditors whose debts were contracted after that
61 *time, and whose credit to the bankrupt may have essentially made the estate to be distributed, from all participation in the distribution of that estate, and leave the bankrupt liable for all the debts by him contracted after the date of his adjudication. Such a law would be a misnomer, and could not be regarded as a law to establish a uniform system of bankruptcy in any true sense of such law.

The brief of counsel for the opposing creditors was submitted after the above was written, and is herewith inclosed. The same, perhaps justifying this explanation for the more full information of the judge of the district court, namely, that previous to the question objected to, this bankrupt had been examined several days, and had, as the register thought, given unreserved answers to all questions touching the disposition of his estate up to the time of filing his petition in bankruptcy.

The register, and all the counsel at the time, supposed the question overruled to have been asked with reference to the newly acquired property of the bankrupt, for the purpose of subjecting that estate to the present bankruptcy proceedings.

As to whether the overruled question was asked for the purpose of establishing some connection with, or leading to the discovery of some connection of the present property of the bankrupt with, or as in some way attaching itself to, property owned by him previous to the commencement of these proceedings in bankruptcy, was not, at the time the question was asked, considered. In the opinion of the register this question was unwarrantable for any purpose, after the previous answer of the bankrupt, to the questions preceding it.

In re John Thompson.

FIELD, J. I am of opinion that the question propounded to the witness, and excluded by the register, was not a proper question to be put, for the reasons stated by the register in the foregoing, but am also of the opinion that under General Order No. 10, the register had no power to decide on the competency, materiality, or relevancy of the question, and was therefore wrong in excluding it.

* U. S. DISTRICT COURT, S. D. NEW YORK.

The pendency of the examination of a bankrupt is good cause under General Order 6, for adjourning the hearing on the return of an order to show cause, and such adjournment can be made without requiring creditors to file appearance under General Order 26, objecting to discharge.

In re JOHN THOMPSON.

THE register certifies in this case to the judge, as follows :

The order for creditors to show cause why the above bankrupt should not be discharged, being returnable on the 18th day of February, 1868, at eleven o'clock, the bankrupt with his counsel, Mr. E. More, appeared before me, and Mr. G. A. Seixas, duly appeared for the Merchant's Exchange Bank, a creditor having duly proved his debt, and having by letter of attorney duly authorized Mr. Seixas to appear, &c.

An examination of the bankrupt, pursuant to an order of this court, is now going on before me, the same having been carried on and adjourned from day to day for several days, and having been this day continued and not concluded.

Mr. Seixas thereupon requested that all proceedings upon the return of said order to show cause be adjourned, pending the examination of the bankrupt and others.

Mr. More, on behalf of the bankrupt, objected to any adjournment on the ground that unless Mr. Seixas should first enter his appearance under Rule 24, it would be irregular to

In re Robert C. Rathbone.

so adjourn the proceedings as to enable a creditor to enter his appearance in opposition to the discharge at a future day.

Mr. Seixas claimed and insisted that an adjournment of the hearing and proceedings, upon the order to show cause, necessarily operates to extend the time for a creditor to enter his appearance in opposition, and that the rights of a creditor on the adjourned day of the order to show cause, are the same in all respects as on the return day.

The opinion of the register is, that the pendency of the examination of the bankrupt constitutes good cause under the 6th general rule, for adjourning the business of showing cause, and that such adjournment can properly be made without requiring the creditors to file an appearance under Rule 24, objecting to the discharge. I accordingly adjourned the business to a day agreed upon by the parties.

The bankrupt thereupon requests me to certify my opinion to the court, which I now respectfully do.

ISAAC DAYTON, *Register.*

BLATCHFORD, J. The register was correct in his decision.

U. S. DISTRICT COURT, S. D. NEW YORK.

A specification in opposition to a bankrupt's discharge which avers that he has property which he has omitted from his schedule, and has been guilty of negligence in delivering to the assignee property belonging to him at the time of the filing of his petition, is specific enough to be triable; likewise a specification avering wilful false swearing to his schedules on the part of the bankrupt.

In re ROBERT C. RATHBONE.

BLATCHFORD, J. In this case the creditor has, under leave granted to him by the court, filed further specifications of the grounds of his opposition to the discharge of the bankrupt.

First. So much of the first specification as avers that the

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original indebtedness of the bankrupt to the creditor was created through the false and fraudulent representations of the bankrupt, is merely an averment that the debt was created by the fraud of the bankrupt. As such, the debt would, under section 23 of the act, not be discharged by a discharge of the bankrupt. The fraudulent contracting of a debt is not made by section 29 a ground for refusing a discharge, and probably for the reason that such debt will not be effected by the discharge. Besides, if the discharge could be refused, because the debt was created through the fraudulent representations of the bankrupt, the nature and character, and time and place, and circumstances of the representations must be specified, and the particulars wherein they were false and fraudulent must be set forth; otherwise, the specification is not available for any purpose.

So far as the first specification avers that there is a false statement in Schedule A, No. 3, to the bankrupt's petition, it is insufficient because it does not aver that such statement was "wilfully" false. Section 29 requires that false swearing in a petition, schedule, or inventory should be "wilfully" false.

Second. The second and third specifications relate solely to transactions by the bankrupt, under and in regard to an assignment made by him in 1854. They do not set forth any ground that is covered by section 29 of the act.

Third. The fourth specification is defective. It merely avers that a certain statement in Schedule A, No. 3, to the petition is "untrue." It ought to aver it to be "wilfully" untrue.

Fourth. The fifth specification, so far that it avers that the statement in Schedule B, No. 1, annexed to the bankrupt's petition is untrue, is defective in not averring it to be "wilfully" untrue.

The portion of the fifth specification which avers that the bankrupt is entitled to the two lots in Sixty-third Street, may be regarded as a sufficient specification to show that the bankrupt has been guilty, under section 29, of negligence in delivering to the assignee property belonging to him at the time

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of presenting his petition and inventory. Schedule B, No. 1, sets forth that the bankrupt has no real property, and it is to be assumed that he has delivered none to the assignee.

So much of the fifth specification as avers that the bankrupt is entitled to "other real estate," is too vague and general to be triable.

Fifth. The sixth specification is defective. It avers that the bankrupt falsely testified in respect to a certain matter, on an examination in this matter before the register, but it does not aver that the bankrupt wilfully swore falsely on such examination in respect to such matter, nor does it aver that the fact in regard to which the false testimony was given was a "material fact" as is required by section 29.

Sixth. The seventh specification is sufficient. It avers in substance wilful false swearing by the bankrupt in Schedule B, No. 3, to his petition, in swearing that he had no choses in action. Whether the fact that the bankrupt owned a life insurance policy on his own life, and did not set it forth among his assets, is to affect his discharge, is a question which will be disposed of hereafter.

Seventh. The eighth specification I hold to be sufficient as being in substance an averment of negligence in the delivery by the bankrupt to the assignee of property belonging to him at the time of the presentation of his petition.

Eighth. The ninth and tenth specifications are altogether too vague and general.

The result is, that the portion of the fifth specification particularly mentioned above, and the seventh and eighth specifications are triable.

If either party desires to take further testimony in regard to them, a reference will be made to Register Ketchum to take such testimony, and report it to the court.

D. G. Barnitz, for the bankrupt; *H. P. Herdman*, for the creditor.

In re Samuel W. Levy & Mark Levy.

U. S. DISTRICT COURT, S. D. NEW YORK.

A creditor proving his debt against a bankrupt, cannot afterwards maintain a suit for the claim, and unsatisfied judgments already obtained are discharged and surrendered in by the proving of the debt. A creditor may moreover sue any one else liable on the same debt, and proceedings pending against others thereon, and unsatisfied judgments already obtained are not affected, discharged, or surrendered by the proving of the debt.

In re SAMUEL W. LEVY & MARK LEVY.

ON the return of the order to show cause in the above matter, Mr. Charles H. Smith presented notice of appearance and intention to file objections on the part of Messrs. H. B. Clafin & Co., John M. Davis & Co., H. Duhring & Co., Hoyt, Sprague & Co., Albert C. Lamson, and Jacob Stettheimer, Jr., creditors of the bankrupts. Messrs. Benedict & Boardman, on the part of the bankrupts, objected to the receipt thereof by the register, on the ground that the said creditors had not proved their claims, and therefore were not entitled to appear in the case to oppose the discharge of the bankrupt. Whereupon Mr. Smith read an affidavit which is hereunto annexed. The register decided that the said creditors were not entitled to appear in the proceedings and file their objections, until they should first have duly proved their claims respectively.

Whereupon the parties desired the question to be certified to the court, and Mr. Smith handed up his points, which are hereunto annexed.

Pursuant to the requirement of the 19th Rule of this court, the register respectively submits that his decision aforesaid is based upon the language of the 29th section of the act, which provides that the court shall order notice to be given to all creditors who have proved their debts to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt. Section 31 does not provide that *any* creditors may oppose, but speaks of "any creditor opposing," referring to those who may op-

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pose, *i. e.*, those who are called to the meeting under the provisions of section 29. It is true that section 24 provides that a creditor who may *not* have proved his demand in the proceedings may attach the discharge within two years, but this attachment is a substantive proceeding, not in, but independent of the proceeding taken by the bankrupt to procure his discharge.

I. T. WILLIAMS, *Register*.

BLATCHFORD, J. The register was correct in his decision.

If a creditor proves his debt against a bankrupt, the only effect under section 21 of the act is, that he cannot afterwards maintain a suit against the bankrupt on the debt, and that proceedings pending thereon, against the bankrupt, and unsatisfied judgments already obtained thereon against the bankrupt, are discharged and surrendered in by the proving of the debt. But the creditor may still sue any one else liable on the same debt, and proceedings pending against others thereon, and unsatisfied judgments already obtained against others thereon, are not affected, discharged, or surrendered by the proving of the debt. In this respect the 21st section must be construed in connection with the 33d section, which provides that "no discharge granted under this act shall release, discharge, or affect any person liable for the same debt, for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise." Neither the discharge of the bankrupt, nor any step taken by the creditor in the course of the proceedings in bankruptcy, in regard to his debt against the bankrupt, can have the effect to release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

February 28, 1868.

In re Daniel P. Kingsley.

U. S. DISTRICT COURT, MASSACHUSETTS.

A debt barred by the statute of limitations of the state where the bankrupt resides, cannot be proved against his estate in bankruptcy.

The entry of a debt upon the schedule by a bankrupt is not such an acknowledgment or new promise as will revive the debt.

In re DANIEL P. KINGSLEY.

LOWELL, J.¹ The questions certified and argued in this case are whether a debt which is barred by the statute of limitations of Massachusetts, where the bankrupt has resided for the last ten years, and where these proceedings * are had, but not barred by the statute of limitations of Vermont, where the creditors reside, and where both parties resided when the contracts were made, can be proved against his estate in bankruptcy. If not, whether the act of the bankrupt in entering the debt upon his schedule is such an acknowledgment or new promise as will revive it.

To the first question it would seem to be a sufficient reply that the statute of limitations would bar a suit in any court of law in this district and especially in the circuit court of the United States. For courts of bankruptcy in disputed cases must refer such questions to the other courts, or at least must decide them upon the same principles as other courts would. Thus, by our statutes, all such disputes may be tried, either by prosecuting to final judgment any suit already pending, or where the dispute first arises after the proceedings have been begun, by trying it according to the course of the circuit court in actions at law. I cannot resist the conclusion that any plea which would be good at law (this being a legal debt) must be good in bankruptcy.

But as the question has been decided otherwise by a judge from whom I differ with great hesitation,² and has been argued here at length, I will proceed to show why, in my judgment, the same result ought to follow upon principle and authority, even if the mere fact that the defence is good at

¹ Lowell's Decisions, p. 216.

² Blatchford, J., *Ray's case*, 2 Bened. 53.

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law, were it not, as I think it is, absolutely binding and decisive.

Statutes of limitations are remedial and beneficial. They are founded upon the sound principle that lapse of time, by obscuring the truth, renders the administration of justice uncertain, and that, for the sake of justice as well as peace, payment ought to be presumed after a certain period has passed. If the evidence of debt be of a high and formal nature, the evidence of payment may be expected to be more formally made, and preserved with more care than in mere simple contracts; but even in such cases, some period works a bar. It is not a presumption of fact which may be rebutted by proof of non-payment, but a conclusive presumption of law. 1 Greenl. Ev. § 16. So useful and important have these statutes been found, that courts of equity, when not strictly bound by them, have adopted them as binding rules, and they are so regarded by the circuit court of the United States sitting in equity. If there were a discretion vested in the courts of bankruptcy to adopt a new rule, it seems to me they would follow this analogy.

The point was decided in this way by Lord Eldon, in *Ex parte Dewdney*, 15 Ves. 479, and afterwards reheard and reviewed by the same learned judge, when he said that his first opinion was strongly confirmed, and that he had additional reasons for it. But these he does not appear to have recorded though he intended to do so. See note A, to *Ex parte Burn*, 2 Rose, 59; *Ex parte Roffey*, 19 Ves. 468. The reasons which he has given are ample, and have been accepted in England, and his decision, though opposed to a ruling of Lord Mansfield at *nisi prius*, and to the practice of some of the ablest commissioners of bankruptcy, has been acquiesced in, and has been repeatedly recognized as law, though never again directly questioned. *Ex parte Ross*, 2 Gill & J. 46, 330; *Gregory v. Hurrill*, 5 B. & C. 341. Besides the mischiefs which the statutes of limitations were intended to remedy, and which would be aggravated by the negligence in the preservation of evidence which they are calculated to in

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duce, and do induce, after their bar is supposed to shield a debtor from suit, all which apply as strongly in bankruptcy as in any other form of suit, there would be special hardships to bankrupts, or supposed bankrupts, as well as to their creditors, in adopting a different rule in bankruptcy from that which prevails at law. Thus an honest debtor, who makes a satisfactory and honorable composition with all his known creditors, would be liable to be prosecuted in this court as a fraudulent bankrupt for making that very composition; and this by a person who could not sue him in any court in this district, which is the only district in which proceedings in bankruptcy could be taken against him, and on the hearing of such a petition the presumption of law would be reversed, and he would be obliged to prove that he had paid an outlawed debt. So upon the question whether a debtor is insolvent or not, and many other points. The mischiefs would be far reaching and intolerable.

It is said that the bankrupt law, being uniform throughout the United States, ought to be so worked as to give every creditor who could sue in any state or territory of the Union the right to proceed in bankruptcy, and therefore, although it be granted that some limitation should be applied, it must be one which would be good throughout the Union. There is great plausibility in this argument, but it is not strong enough to overthrow the arguments on the other side. The right to sue must depend on the forum. Statutes of limitation relate only to the remedy, and cannot have any extra-territorial effect. If it were possible to have a statute of this kind, of general territorial effect throughout the jurisdiction of the United States, it might be very useful, but there is none such. The general rule, therefore, sought to be applied, does not exist. If there were such a one, no doubt this would be barred by it, because it is a simple contract debt of more than ten years' standing; and such a debt is barred, I suppose, by the statutes of every state and territory when applied to defendants who have been within their jurisdiction for that period. They do not bar suits against persons not within their

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jurisdiction, simply because they have nothing to do with them.

Most of them, perhaps, following the common law rule of prescription and for purposes of convenience, bar all suits for twenty years, and the result of holding that the law of the states and territories where this remedy is not sought, shall be regarded as simply to abolish the statutes of limitations, and revert to a common law prescription. But the very fact that this debt is not barred by the laws of Oregon, or of any other state which has no jurisdiction of it, and because it has no jurisdiction of it, shows to my mind that the law of such a state ought not now to be applied to it. In such a matter as this, the courts of the United States must, in the absence of a law of congress, be guided by the law of the forum. There can be no other rule.

The argument most strongly pressed in this case on behalf of the creditor is that the statute of bankruptcy intends that all debts should be discharged, wherever held; therefore, this debt must be discharged, and if so, it is a provable debt, for only provable debts are discharged.

There can be no doubt that this is a provable debt, and that it will be discharged by the certificate, if the bankrupt obtains one. All debts which by their nature are provable, are discharged whether they in fact could be proved or not. Thus, debts due to an alien enemy, or to one dead or insane, or who accidentally failed to prove, or was not notified, all these, and many others that could be mentioned, would be barred, though it might be impossible that they could be proved. Because this debt is provable, it does not follow that it can be proved. The question is, whether it is a debt at all. A debt that has been paid cannot be proved, but it will be discharged; that is to say, the payment need not be relied on after the certificate has been obtained. It would be a singular reply to a plea of discharge in bankruptcy, that the debt was not discharged because it could not have been proved, and that it could not have been proved because it had been paid, or because the court of bankruptcy found rightly or otherwise

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that it had been paid. Yet, that is all that the rejection of this proof amounts to. Applying the law of the forum, I find as a presumption of law, that this provable debt has been paid. All provable debts are discharged; but all supposed debts to which a certificate of discharge would be a bar, are not necessarily provable. This difference arises in a case like this, from the fact that the bankrupt law deals with the contract itself, and discharges it, and so, necessarily, has a much wider reach than the law of limitation, or than rules of evidence which touch only the remedy. The same thing is true in England, and would be so in our states, excepting that (by construction) the Constitution of the United States forbids them to deal in this mode with contracts between citizens of different states. In England, the statutes of limitation and of bankrupts are passed by the same legislature; but one has a much wider operation than the other, so that a debt held in Scotland, or England, or the colonies, or abroad, may be discharged, though the statutes of limitations may prevent its being proved. Mr. Christian, whose opinion and practice had been much opposed to the rule as laid down in *Ex parte Dewdney*, gives us to understand that the argument that the debts would necessarily be discharged, was not overlooked in the discussion of that case. The argument that congress, by discharging debts due throughout the Union, must intend to adopt all the statutes of limitation in the Union, proves too much. The same argument will show that it must have adopted those of all the commercial countries of the world, for debts due throughout the world are discharged in bankruptcy if the contract were to be performed here. *Hunter v. Potts*, 4 T. R. 182; *Potter v. Brown*, 5 East, 124; *May v. Breed*, 7 Cush. 15; Story Conflict of Laws, § 335, &c.

The hardship of this rule is much less than might at first appear. It is only on the supposition that the creditor might possibly sue his debtor away from home that there is any hardship at all. All that the foreign creditor has to do is to sue his debtor at home, and in due season, and keep his debts alive. Our statute of limitations makes no discrimination

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against foreign creditors, but in some respects quite the contrary; for if he has been beyond seas, he has a longer time allowed him. If within the United States, there is no reason for any discrimination in his favor. The complaint of any creditor that he might probably find a foreign forum, which, because it is foreign, would give him a remedy which he has lost by negligence in the true and proper forum, is not entitled to much consideration. One case of practical hardship may be put, and that is when a creditor has actually sued his debtor away from home, and obtained security by attachment or otherwise, which would be taken away by the bankruptcy, and yet he would have no right to prove his debt. I consider that the bankrupt law makes a sufficient provision for such a case, by enacting that an action might be prosecuted to final judgment, and the amount of the judgment be proved in bankruptcy.

I agree with Judge Blatchford, that the bankrupt, by putting the debt upon his schedule, does not make a new promise to pay it. This depends somewhat upon the particular statute of limitations, and it has been so decided in Massachusetts in a case under the state insolvent law, so called, which is a bankrupt law, though one limited and restrained in its operation by the Constitution of the United States. And it is so upon principle, because the debtor does not make out his schedule with any view to the payment, but to the discharge of his debts. And besides, the creditors have a right to plead the statute as well as he, and they are not bound by his schedule: *Richardson v. Thomas*, 13 Gray, 381; *Roscoe v. Hale*, 7 Gray, 274; *Stoddard v. Doane*, 7 Gray, 387, and see the cases in *Roscoe v. Hale*. In those cases, it is true, the debt was not barred when the schedules were made; but if the schedule were evidence of a new promise, two of those decisions must have been for the plaintiff, because the schedules have been made within six years before suit brought. The fact weakens the argument to this extent, that it cannot be said the debtor was merely carrying out his legal duty in putting the debt in his list, and that he did it, as it were,

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under legal compulsion, and, not voluntarily. I do not suppose that he would be so bound in respect to this debt, but it still remains true that he did it *diverso intuitu*.

Proof rejected.

February, 1868.

U. S. DISTRICT COURT, MASSACHUSETTS.

The oath of allegiance annexed to the debtor's petition may be taken before a register.

In re ANDREW J. WALKER.

LOWELL, J. One of the creditors objects that all the proceedings have been irregular and void, because the oath of allegiance annexed to the debtor's petition was taken before Mr. Sherman, one of the registers in bankruptcy for this district. This objection affects not only this case but nearly all others in the district, because the clerk, finding no warrant in the law or rules for administering this preliminary oath, has carefully abstained from doing so, and the several registers have been relied on for this business. It is argued that by section 4 of the act, registers are empowered to administer oaths in proceedings before them, and that no case is before them until it has been referred to them, and that this expression of one power impliedly excludes all others of a similar kind. This argument has much weight, and if this were the whole law on the subject, might be controlling, but there are other sections applicable to this question. By section 11 every petitioner for the benefit of the act shall annex to his petition a schedule, verified on oath before the court, or before a register in bankruptcy, or before one of the commissioners of the circuit court, of his debts, &c., and an inventory verified in like manner, of his estate, &c., provided that all citizens of the United States shall take and subscribe the oath now in question. It is not said in terms, that this oath may be taken in the same way as the others which are in-

In re Louis Glaser.

cluded in the same paragraph; but it would be no strained construction to hold that it is so intended.

Again, by section 10 the supreme court have power by rule to regulate the duties of the several offices of the district courts, and generally for carrying the provisions of the act into effect, and they have established forms of petition, which by the rules we are required to follow, and in that form, this oath is to be taken before a judge, register, or commissioner. I cannot but conclude that the supreme court either considered that the law was to be construed to include registers, or that by virtue of their full powers to regulate the duties of officers and practice generally, they saw fit, as well they might, to give them that authority.

U. S. DISTRICT COURT, S. D. NEW YORK.

8 B. R. 24. A United States district court has power to relieve a bankrupt from arrest, on process of a state court, in an action founded upon a debt that may be discharged in bankruptcy. The question whether the debt be one contracted in fraud, may be examined into and determined by the district court.

In re LOUIS GLASER.

IN this case, the bankrupt filed his voluntary petition in bankruptcy on the 13th of January, 1868. Among the debts set forth in his petition is one to Townsend & Yale, of \$451.20, for merchandise sold by them to him. On the 5th of February, 1868, Townsend & Yale commenced a suit against him in the superior court of the city of New York, to recover the debt. The complaint in the suit is founded solely on a sale and delivery of goods to the amount of the debt. On the same day, the bankrupt was arrested by the sheriff of the city and county of New York, on an order of arrest granted by the state court on the 4th of February, 1868, which required him to be held to bail in \$650. The ground of arrest set forth in the affidavit, on which the order of arrest was granted, was that the bankrupt was guilty of a

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fraud in contracting the debt, and the circumstances alleged to constitute the fraud are set forth in the affidavit. The bankrupt now shows to this court, by affidavit, that, on the 15th of January, 1868, he was adjudicated a bankrupt and received from the register a certificate of protection; that, on his arrest, he gave to the sheriff the bail required; that all the allegations of fraud contained in the affidavit on which the order of arrest was granted are untrue; and that the debt to Townsend & Yale is one provable in bankruptcy, and one from which a discharge in bankruptcy will relieve him. He therefore applies to this court for an order discharging him from arrest, and discharging the bail which he has given. The application is founded on the last clause of the 26th section of the bankrupt act, which provides that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded upon some debt or claim from which his discharge in bankruptcy would not release him."

The creditors in this case have not proved their debt in the bankruptcy proceedings, and they raise an objection to the jurisdiction of this court to grant the relief asked by the bankrupt, on the ground that no power is conferred on this court by the bankrupt act to enforce the protection from arrest given by the 26th section, even though it should find that the bankrupt was arrested after the commencement of the proceedings in bankruptcy, and that his arrest was founded on a debt from which his discharge in bankruptcy would release him. The point taken is, that the circuit court for this district is the proper court to administer the relief sought, and not the district court; that, under the 2d section of the act, the circuit court has "a general superintendence and jurisdiction of all cases and questions arising" under the act, and, therefore, of this question, which arises under the 26th section; and can, on the application of the party aggrieved, hear and determine the case. It is urged that the jurisdiction invoked by the bankrupt on this application is not within the special grants of jurisdiction given by the 1st

In re Louis Glaser.

section of the act to the district court; that this is not a case or a controversy arising between the bankrupt and a creditor who claims a debt or demand under the bankruptcy; that it does not concern the collection of the assets of the bankrupt; that it does not concern the ascertainment or liquidation of any lien or other specific claim on any of such assets; that it does not concern the adjustment of any priority or conflicting interest in the sense in which that language is used in the 1st section; that it does not concern the marshalling or disposition of any of the funds or assets of the bankrupt; and that it does not concern any act, maker, or thing to be done by this court, under or in virtue of the bankruptcy, within the meaning of that language in the 1st section.

BLATCHFORD, J. The first clause of the 1st section of the act gives to the district court original jurisdiction in this district in all matters and proceedings in bankruptcy, and authorizes it to hear and adjudicate upon the same according to the provisions of the act; and that general grant of jurisdiction is followed by the special grant before referred to, extending such jurisdiction "to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." Registers are, by section 3, to be appointed "to assist the judge of the district court in the performance of his duties" under the act. By section 4, power is given to every register, and it is made his duty "to grant protection." This undoubtedly means protection to the bankrupt from being arrested in cases where he is not liable to arrest — protection from arrests to which, by the 26th section, he is not liable. The justices of the supreme court have so construed it, for not only have they by General Order No. 5 defined one of the powers of a register to be to grant protection on the surrender of a bankrupt, but they have, by General Order No. 4, provided that a bankrupt "may receive from the register a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the

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court." So also they have, by General Order No. 27, provided that if a bankrupt is "committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court" (meaning the court in which his petition is filed) may, upon his application, "discharge him from such imprisonment," and that "if the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court, to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and, if so provable, he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be." These provisions of General Orders No. 27, so far as they authorize the discharge from arrest or imprisonment of a bankrupt arrested on process founded on a claim provable in bankruptcy, where the claim is one from which his discharge in bankruptcy will not release him, are not warranted by the 26th section of the act. By the 10th section of the act, the justices of the supreme court are required, subject to the provisions of the act, to frame general orders for carrying the provisions of the act into effect, but they are not authorized to extend the exemption of a bankrupt from arrest beyond the limit prescribed by the 26th section of the act. By the 33d section of the act, a debt which cannot be discharged is yet made provable. By the 26th section, though a debt is provable, it may, if not dischargeable, be the foundation of an arrest. The 27th General Order goes beyond the act, by making exemption from arrest coextensive with the provability of a debt. But the 27th General Order, in so far as it is consistent with the act, and in so far as it applies to debts or claims which will be relieved by a discharge in bankruptcy, is a clear indication that the justices of the supreme court understand the act as giving to the district court power to enforce the exemption from arrest to which a bankrupt is entitled under the act. The 26th section confers such exemption. One of the means

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prescribed by the act for securing it, is a protection against arrest, as a muniment or safeguard. The giving of this protection by the court or a register is an act done "under and in virtue of the bankruptcy." The enforcing such exemption from arrest, when a bankrupt is entitled to it by section 26, whether a protection has been granted or not, and whether a protection granted has been violated or not, is an act done "under and in virtue of the bankruptcy." The exemption from arrest is conferred by section 26, because the party is adjudged a bankrupt by the district court, and the enforcing of such exemption by affirmative action is clearly an act "to be done under and in virtue of the bankruptcy." Being such, the jurisdiction of the district court in which the bankruptcy proceedings are pending, clearly extends under the 1st section of the act, to the doing of this act by any appropriate method. Where the bankrupt is not in close custody, a *habeas corpus* may not be necessary. A simple order may suffice to give the requisite relief. The order will be an order in bankruptcy, and by the 1st section of the act full authority is given to the court to compel obedience to all orders and decrees passed by it in bankruptcy, "by process of contempt and other remedial process." In some cases a *habeas corpus* may be necessary, and such a remedy is contemplated by one provision in General Order No. 27. Irrespective of that pro-

vision, if a bankrupt is arrested in violation of the 26th section of the act, and is thus restrained * of his liberty in violation of a law of the United States, this court or the judge thereof, has power, under the act of February 5, 1867, entitled "an act to amend an act to establish the judicial courts of the United States," approved September 24, 1789 (14 U. S. Stat. at Large, 385), to issue a writ of *habeas corpus* and release him from his imprisonment. It follows, therefore, that this court is competent to grant to the bankrupt, in this case, the relief sought by him, provided his arrest was founded on a debt from which his discharge in bankruptcy would release him. This court must necessarily inquire into that question, and decide it for itself, on this ap-

In re William H. Little.

plication. It is a disputed question of fact, which cannot be decided on *ex parte* affidavits, whether the debt in this case was contracted by the fraud of the bankrupt, and is, therefore, one from which his discharge in bankruptcy would not release him. If the bankrupt desires it, a reference will be ordered, under section 38 of the act, to take testimony on the question, and the application will be heard and decided on the testimony so taken.

Henry Morrison, for the bankrupt; *John J. Townsend*, for the creditors.

March, 1868.

U. S. DISTRICT COURT, S. D. NEW YORK.

A bankrupt may amend his petition after adjudication so as to bring in his copartner in order to obtain a discharge of copartnership as well as individual debts.

In re WILLIAM H. LITTLE.

I, JAMES F. DWIGHT, the register in charge of this entitled matter, do hereby certify that in the course of the proceedings herein, the following question arose pertinent to the proceedings.

Facts. On the 10th of December, 1867, William H. Little, of the city of Elizabeth, New Jersey, carrying on business at No. 24 Church Street, New York city, filed his petition for adjudication in bankruptcy and discharge from his debts, in this court. He was duly adjudged a bankrupt, and on the 6th day of February, 1868, at the first meeting of creditors duly held, an assignee was chosen by the creditors, and subsequently the register executed the usual deed of assignment to the assignee.

The petition of the bankrupt made no allusion to a copartnership or copartnership debts; but in the schedules attached thereto, it appeared that debts had been contracted jointly with one Charles H. Dana, in the firm name of "Little & Dana," and that there were credits due to said firm of "Little & Dana."

On the 25th of February, the said bankrupt, William H.

In re William H. Little.

Little, filed a sworn petition with the register, of which the following is a copy :

Title. The petition of William H. Little respectfully states and shows :

That on the 10th day of December, 1867, your petitioner filed with the clerk of this court his petition in bankruptcy as a member of the firm of "Little & Dana," a firm composed of your petitioner and Charles H. Dana.

That in said petition he omitted to include the name of his said partner, Charles H. Dana, and now petitions and asks that an order may be made and entered herein, permitting your said petitioner to amend his petition and schedules in such manner as will permit his said partner to be joined with him in the final orders of discharge which may be granted by this court, adjudging him discharged from the debts and liabilities of said firm of Little & Dana.

WILLIAM H. LITTLE.

On this petition, attorneys for the bankrupt moved that the register grant an order in accordance with the prayer of the bankrupt, which motion being denied, the bankrupt, through his attorneys, prays that the question may be certified to the judge for his decision as to whether the register erred in refusing to grant the order prayed for ; which prayer is granted in accordance with the rules in practice, and this certificate is made in conformity thereto.

In my opinion the prayer of the petitioner cannot be granted. No allusion to a partner or a copartnership was made in the original petition.

Section 36 of the law, and Rule 18 of the supreme court, indicate the manner in which copartners may be drawn into proceedings in bankruptcy, and I do not see how, at this stage of the proceedings, *and in this manner*, Charles H. Dana can be included in the matter of William H. Little's bankruptcy.

Which certificate and opinion is respectfully submitted, this 29th day of February, 1868.

JAMES F. DWIGHT, *Register.*

In re William H. Little.

BLATCHFORD, J. I think the register erred in denying the motion of the bankrupt, which was, that he be permitted to amend his petition and schedules in such manner as will permit his copartner to be joined with him in the proceedings in regard to the bankruptcy of the firm. The petition, which I have examined, is an individual petition, setting forth only one schedule of debts and one inventory of assets, both of which are stated in the petition to be the individual debts and assets of the petitioner. But the schedule of debts shows that a large portion of the debts consists of debts of a copartnership of which the petitioner was a member, and the inventory of assets shows that part of the assets consists of credits due to said copartnership. Under these circumstances, as the petitioner prays to be discharged from all his debts provable under the act, and some of the debts set forth in the schedule annexed to his petition are debts of the said firm, the petition is one to have the firm declared bankrupt on the petition of one of its partners, within the provisions of section 36 of the act, and of General Order No. 18. As Dana did not join in the petition of Little, he ought to have been brought in by proper proceedings under General Order No. 18, before an adjudication of bankruptcy was made on the petition of Little. The defect is now sought to be remedied by Little. His petition requires to be amended, and his schedules require to be amended. He asks to be allowed to amend them so as to join Dana with him in the proceedings. Dana can be so joined, either by joining voluntarily in the petition of Little, or by being brought in, on notice, under General Order No. 18. When he is so brought in, he can be discharged from his debts, including the debts of the firm and, until Dana is so brought in, Little cannot be discharged from the debts of the firm, because the theory and intent of section 36 of the act, and of General Orders Nos. 16 and 18 are, that the creditors of a firm shall be required to meet but once, and in one bankruptcy forum all questions in regard to the bankruptcy of the firm, and in regard to their debts against the firm, and in regard to the administration in bankruptcy of the assets of the firm.

In re Benjamin Sherwood.

Section 26 provides that the bankrupt shall "be at liberty from time to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts;" and General Order No. 33 prescribes regulations in regard to the amendment of schedule. General Order No. 7 provides "that the court may allow amendments to be made in the petition and schedules, upon the application of the petitioner, upon proper cause shown at any time prior to the discharge of the bankrupt." General Order No. 7 confers on the register the power of ordering amendments of any proceedings. The case was therefore a proper one for the register to allow the bankrupt to amend his petition and schedules for the purpose set forth in his application to amend.

The clerk will certify this decision to the register, James F. Dwight, Esq.

March 4, 1868.

U. S. DISTRICT COURT, E. D. PENNSYLVANIA.

A question as to charges of a register in bankruptcy may be raised by an exception, or may, at the request of a party, be certified by the register.

The court will not, in all cases, refuse to entertain such a question upon a certificate by the register of his own motion.

It seems that the register may, besides the charges for attendance, &c., specified in the 47th section of the act of congress, and in General Order No. 30, make reasonable charges for his additional services in the business of the private sittings preceding the warrant, the business of the first public meeting of creditors or its adjourned sittings, and the business of another public meeting after the application for a discharge.

At the last of these public meetings before the register, or at any adjourned session of it, the bankrupt's examination may be finished;¹ and if no assets have been discovered, any business performable under the 27th and 28th sections of the act may also be transacted.

For all these purposes the notices may be included in the notices for the hearing in court on the bankrupt's application for a discharge. If the business of the meeting before the register is not finished, or the papers are not filed in the clerk's office before the day appointed for the hearing in court, weekly continuances are entered by the clerk, so that the notices may remain in force; and the time for entering opposition is, on the return of the papers, enlarged, for ten days from the next stated weekly session.

Services of the register for any of the above mentioned purposes in any one of

¹ See note, p. 351.

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the counties for which he has been appointed, whether he resides in it or not, are not services under a special order of the court, within the meaning of the 47th section of the act.

For his mere attendance, exclusive of any additional services, he is not entitled to more than three dollars per day, unless he should be allowed five dollars for the *first* day on which he may attend under the order of reference when he does not himself appoint the time.

Such an allowance of five dollars cannot be made if he thus attends on the first day in two or more cases, and makes a distinct charge for attendance in each. He cannot then receive more than three dollars in each, for the same day.

The fees and charges of a register, including those for expenses, may fall short of, or may exceed the amount of the deposit of fifty dollars, required by the 47th section of the act to be made in order to secure them. But it seems that in an unopposed case, in which there is no estate, he cannot be allowed his actual travelling and incidental expenses in journeys to and from any county, however remote, within the limits for which he has been appointed, to an amount exceeding any reasonable proportional part of this deposit. Nor can the business in bankruptcy of such a county be postponed until its accumulation may enable him to lighten such charges by distributing them among several cases. ¹

The books and papers in a register's office should be as open to inspection at the local seat of justice, as those in the office of the clerk of a court.

In re BENJAMIN SHERWOOD.

THE register certifies that in the course of the proceedings the following question arose, to wit:

The bankrupt in this case living at Honesdale, the county seat of Wayne County, filed his petition on the 30th day of July, 1867, and on February 6, 1868, the register certified to the court his conformity to the bankrupt act. Pursuant to directions received, the register held a monthly court in bankruptcy, in Honesdale, travelling thither from Easton, a distance of about 136 miles *via* Scranton, and about 170 miles *via* New York city, and back again six (6) times before the completion of the case; occupying from three (3) to six (6) days on each journey — travelling in all about sixteen hundred (1600) miles, and consuming in all twenty-one and one half days. The labor performed is that of an ordinary unopposed case, and the expenses of travelling for the register, as distributed among all cases at Honesdale, is seventeen dollars and forty-five cents (\$17.45). In making up the fee

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bill, the register finds no difficulty as to two items, to wit: For minimum fees in ordinary unopposed cases, \$50; for travelling expenses, \$17.45.

As regards the third item — compensation for the number of days employed — the register asks what sum he is entitled to charge per day, for every day employed in visiting the county seats within his congressional district, under instructions from the court, and by the desire of the bankrupt and his attorney?

If the clause in section 47 of the bankrupt act of March 2, 1867, "for every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court," comprehends the case,

as it seems to the register to do, then he prays the district court to allow him such * sum per diem for twenty-one and one half days as may seem just and reasonable.

The above case is stated in order to decide fifteen cases now pending in bankruptcy at Honesdale.

The court returned the following answer:

CADWALADER, J. The certificate states no point or matter on which a *party* desires an opinion. Nor does the register certify any case or question as having been stated by parties for my opinion. Whether such a certificate is directly authorized by the 6th section of the act of congress, may be doubted. The regular mode of raising a question as to the propriety of charges of the register is by exceptions on the part of the assignee, or, in some cases, on the part of the bankrupt. But where parties may have no disposition to take such exceptions, or the register desires to receive instruction as to his official duty, there is perhaps no objection to his adopting, as he has done here, a course analogous to that prescribed by the 6th section. If so, however, the question submitted should not be decided in his favor unless the parties opposed in interest have been so notified as to afford full opportunity for contestation.

As the certificate under the 6th section of the act "may

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be varied by the judge," I will state in answer the following important preliminary questions :

First. Can a register in bankruptcy fulfil the requirements of his official duty by holding stated or occasional *monthly* sessions, in a county of his district in which he does not reside, on days of his own appointment?

Second. Can he fulfil those requirements without having in every county in which he may act within his district, an office always open, attended by himself or by a resident clerk, where the docket, minutes, and papers of every bankruptcy in such county are securely and methodically kept, and are *there* open every day during the hours of business, to the inspection of those interested?

Third. Does any enactment of congress, or general order of the judges of the supreme court, or course of practice in this court, authorize any such charge by a register as "for minimum fees in ordinary unopposed cases, fifty dollars?"

These three questions are prefatorily answered in the negative.

As to the first and second, the register cannot fulfil the duties of his appointment for any county in which the business in bankruptcy must wait upon his convenience, or in which he cannot hold sessions whenever the business may require them, or cannot continue them at convenient short intervals, if not from day to day, as long as may be required. Nor can he fulfil the requirements of his official duty, as to any county in which the books and papers are not so open to inspection, at the local seat of justice, as those in the office of the clerk of a court should be.

As to the third question, the act of congress requires, not payment in advance of the sum of fifty dollars, but, on the contrary, the deposit of it as a security. Against this amount are to be charged all the specific amounts earned for services under the 47th section of the act and the 30th general order. Some of the registers take so strictly limited a view of their rights, as to make, I believe, no charge whatever beyond these amounts, for expenditures. Opinions of district judges

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on this point have, I believe, differed, some of them denying, others doubting, but others admitting, the right to a reasonable allowance for the revision of the papers, and the performance of other duties, requiring the exertion of intellectual effort, and the aid of legal science and experience. I am strongly disposed to make such an allowance, if I can do so without infringing legislative prohibition, express or implied. But such a question cannot be definitively decided *ex parte*. The allowance, if made, must be measured cautiously. I have as yet had no conception that in any ordinary unopposed case, where travelling expenses have not been incurred, the specific charges and additional allowance can together exceed fifty dollars. Where no assets are to be accounted for, and the creditors are few, the registers have, in some instances, accounted to the assignees for a surplus or balance of the deposit of fifty dollars. Of course this amount may be exceeded by the charges in cases in which complicated questions concerning proofs or assets arise, or in which the solicitor of the bankrupt is extraordinarily inattentive. I have no present recollection of any peculiar complexity of any case in the county to which the present certificate refers.

The foregoing remarks may serve to introduce the observation, that the services performed by this register under the 5th and other sections of the act of congress have not been rendered under any *special* order of the court, within the meaning of the provision of the 47th section of the act. They have, on the contrary, been ordinary services, under its general requirements. I have, however, been disposed to admit a single qualification of this view in the case of the first day's attendance of a petitioning debtor before the register, because the register's attendance on this day is not appointed by himself, but is ordered (and, as I would have said *special*ly ordered), by the court. But other district judges have expressed a contrary opinion, after considering the question more maturely. The point here involved is only the difference between five and three dollars, for attendance on the *first* day. This point will not require decision, because the

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register has, I believe, never attended in this county, under such an order, in less than two cases, on the first day. As he will thus be allowed six dollars or more for this day, that is to say, three dollars in each of two or more cases, there can be no sufficient reason for the special allowance, though such reason might have existed if there had been a single case only.

For every day's attendance at the seat of justice of this county, in the case of this bankrupt, three dollars will therefore be the proper charge, if allowable under the conditions prescribed by General Order 6. This does not include the days consumed in travelling to and from the county seat. They will be next considered.

The travelling expenses of the register, whether chargeable under the 5th section of the act or independently of it, appear to have been properly apportioned among the several cases, and should be allowed. He also, as I understand, proposes to charge as to every journey, for two days consumed, one in going and the other in returning, as for days of service rendered in the proceedings. This charge, in addition to the travelling expenses will, if made, be subject to exception. I cannot therefore decide *ex parte* in favor of it. But my present inclination is to allow it, if it does not exceed six dollars (that is to say three dollars per day), provided the charge of six dollars is, like that of the travelling expenses, averaged among the cases for which the journey was made. As a charge of the full amount in every one of the cases, it cannot be allowed. In this case, its proportion will, if allowed, make a small addition to the item of \$17.45.

I have already intimated, under the head of the third preliminary question, that some allowance to a register beyond the payment of his expenses, and for his daily attendances, and of the other items specified in the 47th section of the act, and in the 30th General Order, may possibly be proper, even in an unopposed case in which the assignee receives no assets. Recurring to this intimation, I will make some explanatory suggestions.

In unopposed cases, it is not the course of practice to ap-

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point special commissioners for the performance of occasional incidental or collateral functions, not within the specified official duty of the register. He, nevertheless, performs many such unofficial functions, for which the appointment of a special commissioner would be inconvenient and expensive. This extra work is of such a kind as no person who is not a lawyer could perform. It includes reports, explanatory statements, answers to questions, &c. For such work, a master in chancery, auditor, or commissioner ordinarily receives compensation, beyond his per diem allowances and specific charges. Moreover the register, in at least three stages of an unopposed case in which the petitioner swears and the assignee certifies that there are no assets, must study the case in its general and particular relations. The first stage is that which precedes the issuing of the warrant. The second stage is that of the first public meeting of creditors, and any adjourned settings of it. In a later stage, there must, for several reasons, be at least one other public meeting of creditors.

One reason is that all proofs of debt made before the assignee are necessarily more or less provisional, and that under the act of congress remissness cannot be imputable to a creditor who does not prove his debt at the first meeting, if it is proved at a second meeting. A more important reason, which is twofold, is that, at a private session of the register, the non-existence or hopelessness of available assets cannot be safely determined, nor can the irresponsibility of the bankrupt, and of the assignee, for the want of assets be definitively ascertained. For the same reasons, and others, the examination of such a bankrupt cannot, with any propriety, be closed otherwise than at a public meeting. In this judicial district, such arrangements under these heads are carried into effect, through the register, that the general and particular notices of the meeting for these purposes really cost nothing. Upon the bankrupt's application for a discharge they are included in the notices for the final hearing in court. Under the useful provision of General Order 25, the notices for the transaction,

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at the same public meeting, of any business under sections 27 and 28 of the act of congress, are likewise thus included. The great importance of this public meeting before the register, prior to the day appointed for the final hearing in court, has appeared in the fact that notwithstanding an interval of many days between them, registers who have diligently prosecuted the business, have, in some cases, been unable to complete it until after the day in court. In such cases, through recorded continuances in court, from week to week, the notices remain in force until the papers have been filed by the register in the clerk's office, when all inconveniences are obviated by an order enlarging the time for objections to the discharge for ten days after the next stated weekly session. The amounts of labor of the register in the primary, and in the ultimate stage, are often inversely proportional to each other; and in some cases, the last examinations have developed important disclosures.¹

In ordinary unopposed cases of this kind, an additional * charge of at least five dollars in every one of 76 the three stages, and, in many cases, of ten dollars in one or more of them, would be very moderate. The question whether it is allowable may, as I have said, be raised by an exception. There would be a dangerous tendency, per-

¹ On the 26th December, 1867, the following memoranda were furnished in the form of a circular letter, by the court for the assistance of the registers:

The papers of every bankrupt should, in order to entitle him to his discharge, contain a complete list of his debts and inventory of his estate, a satisfactory exposition of the cause of his insolvency, an account of his losses, with a precise and full statement and explanation of every transfer, disposition, payment, or appropriation, &c., not made in the regular course of his ordinary business for full and valuable consideration, or in the necessary expenses of living of himself and his family, and all other information which may be material as to his business debts or estate.

His examination should not be passed without such full disclosure, affirmative and negative, as may be required under each of these heads. As to his debts and his estate, no repetition of the contents of the petition, or of any former additions or corrections of it by way of amendment, will be required. The last examination, should, however, state whether any omissions in these respects have occurred. The principal purpose of this examination is to obtain disclosure under the several other heads above mentioned.

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haps, of such charges, if allowed, towards undue expansion.¹ Justice may, nevertheless, require their measured allowance.

The most embarrassing consideration which the present certificate suggests, appears to be that, in future, this register will not be able, as heretofore, to lighten the burden of his travelling expenses by dividing it among many cases. It would, of course, be impossible to sanction the postponement of a non-resident register's visits to such a remote county until he may, through the accumulation of business, become able so to distribute the charges. From the burden of examinations under the 26th section of the act, and of other such business, the court might, at his request, relieve him by the occasional special appointment of a resident local commissioner. But in all cases the presence of the register in every one of the three stages which have been mentioned, seems to be indispensable. In many cases he must attend oftener, and in some cases much oftener. If he retains the appointment of this county he cannot expect full reimbursement of his travelling and incidental expenses in all cases. In a case in which there is no expectation of assets, I think that he should not be paid for more than three journeys, though he may make more than three, and that he should not receive more money than twelve dollars for any one journey, though he may expend more money.² I trust that he may be able, without injustice to himself, to acquiesce in these restrictions. He is a most useful officer of the court, and highly respected and esteemed. The appointment of a register who resides in this county would not benefit the inhabitants of it otherwise than by reducing the charges and increasing the facility and frequency of recourse to the officer.

¹ Where sordid motives would induce such an expansion of the charges, they might no less induce an improper multiplication of meetings if the charges were not allowable. Such motives cannot be imputable to any of the present registers. I do not consider precedents under English tariffs of charges applicable.

² So high a charge would probably not be allowed under this head, in the district of any other register.

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* U. S. DISTRICT COURT, S. D. NEW YORK.

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Where a firm is insolvent, it is an act of bankruptcy for a member thereof to suffer its property to be taken on legal process, with intent to give a preference to a creditor of the firm.

The net proceeds of the sale of the property on such process, in the hands of the sheriff, will be ordered to be paid to the assignee in bankruptcy, where it appears that the creditor had reasonable cause to believe that the firm was insolvent.

Insolvency, as used in the 39th section of the bankrupt act of 1867, means a simple inability to pay, as debts become payable.

In re JAMES BLACK & WILLIAM SECOR.

BLATCHFORD, J. The petition in this case was one in involuntary bankruptcy, and was filed on the 22d of June, 1867. The acts of bankruptcy alleged in the petition were that Secor, acting for the firm of Black & Secor, composed of the debtors, procured and suffered the property of the firm to be taken on legal process in favor of Thomas P. Secor, on a judgment entered in the supreme court of New York, June 5, 1867, for \$2,869.78 in favor of Thomas P. Secor, against the debtors, and procured and suffered said judgment to be entered, and an execution to be issued thereon to the sheriff of the city and county of New York, against the property of the debtors, and such property consisting of goods and chattels to be taken by the sheriff by virtue thereof; and that Secor procured and suffered said property to be so taken with intent to give a preference to Thomas P. Secor as a creditor of the firm, and with intent to defeat and delay the operation of the bankrupt act; and that the debt on which the judgment was entered was not a *bona fide* debt; and that the judgment was so procured and suffered with intent to hinder, delay, and defraud the creditors of the firm; and that the firm was wholly insolvent, and had been so for more than a year past, and was so at the time of the commission of the alleged acts of bankruptcy. On the 1st of July, 1867, on proof of due personal service on the debtors of a copy of the petition and of an order to show cause, no opposition being made, an order was made by the court adjudging the debtors to be bankrupts according to Form No. 58.

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On the filing of the petition on the 22d of June, 1867, an order was made by the court, under section 40, that an injunction issue, restraining the debtors and all other persons, and especially the sheriff of the city and county of New York, from transferring or disposing of or interfering with the property of the debtors. The injunction was issued and served.

On the 25th of October, 1867, an order was made by the court, on the application of Thomas P. Secor, and of the sheriff, referring it to the register in charge of the case to take proof of the facts as to whether the bankrupts, or either of them, procured or suffered the judgment referred to to be entered, and execution to be levied with intent to give a preference to Thomas P. Secor or any other person, or with intent to defeat the operation of the bankrupt act, and whether Thomas P. Secor, or any person for whose benefit, in whole or in part, the judgment was entered, had reasonable cause to believe that a fraud on the act was intended, or that the debtors were insolvent, and also whether the judgment, execution, and levy are valid as against the assignee in bankruptcy, and to report the proofs so taken. The order also provided that the sheriff be permitted to sell the goods levied on by him, and that he hold the net proceeds subject to the further order of this court, to be made on the application either of the assignee or Thomas P. Secor, on notice to the other party and to the sheriff.

The register has taken the testimony and reported it to the court.

The net proceeds of sale in the hands of the sheriff are \$1,959.17, and the assignee in bankruptcy now applies to the court, on the proofs taken before the register, and on notice to Thomas P. Secor, and to the sheriff, for an order that the proceeds of sale be paid over to the assignee in bankruptcy.

It appears from the proofs, that the judgment was obtained against the bankrupts as partners and joint debtors, on service of process on Secor alone. Such service was made on the 15th of May, 1867, and the judgment was entered by default on the 5th of June, 1867, which was the earliest day

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on which it could be entered in due course of law. Black knew nothing of the suit or of the judgment until after the judgment was entered. Thomas P. Secor was represented by counsel on the taking of testimony before the register. The witnesses examined were Mr. Townsend (the attorney for Thomas P. Secor in obtaining the judgment), Mr. Dewhurst (a creditor of the firm), and James Black (one of the bankrupts). Neither Thomas P. Secor or William Secor were examined. The amount of assets of the firm which has come to the hands of the assignee in bankruptcy, is less than one hundred dollars, the amount of the individual assets of Black which has come to his hands is less than five hundred dollars, and no individual assets of Secor have come to his hands.

The testimony shows that shortly before the suit was brought, Thomas P. Secor and William Secor came together to Mr. Townsend, the attorney; that Thomas then, in the presence of William, said that he had come to consult Mr. Townsend in regard to a claim which he had against Black & Secor, and that it was due, and he wished to get his pay, or be secured, and was willing to give time, but felt that he ought to be secured; that Thomas then asked Mr. Townsend how he could be secured, and Mr. Townsend told him there was great difficulty in doing it; that William then told Mr. Townsend that the affairs of the firm were sound, and they would be able to pay their creditors, and said he was willing to secure Thomas in any way it could be done, and that his debt should be paid; that, in reply to an inquiry by both the parties as to how William could give security, Mr. Townsend told them that he knew of no way in which a security could be given that would be good to Thomas; that Mr. Townsend then told William that he wanted nothing to do with him, and did not wish to advise with him in the matter, and that, if he was to act for Thomas, he could not act for him; that Thomas then said he wanted Mr. Townsend to act for him; that Mr. Townsend then desired William to leave the office, and told him that he could not have anything to

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do with him or his business; that William withdrew, and Thomas remained; that Mr. Townsend then told Thomas that he knew of only one course to pursue in the matter, and that was, to sue the firm, and to proceed with all diligence in doing it; that he wanted nothing from the firm, but that they would take their own course and collect the debt, if possible, according to process of law; that Thomas then asked Mr. Townsend what he would advise him to do, and Mr. Townsend told him he would advise him to sue as soon as possible; and that Mr. Townsend then took from Thomas a statement of the claim, and drew the summons and complaint. During the conversation referred to, Thomas suggested that he might have a confession of judgment, and Mr. Townsend told him that he could not. William said, in the conversation, that he was anxious to secure Thomas's debt. William and Thomas are brothers. Throughout the interview William maintained that the firm could pay everything if they had time.

The testimony of Black is express to the point, that the firm was insolvent at the time the judgment was obtained and the levy was made, and there appears to have been a series of efforts and propositions in regard to securing Thomas's debt, in which both of the bankrupts and Thomas were engaged, prior to the bringing of the suit, none of which resulted in anything. The plan of bringing the suit was then adopted under the circumstances detailed, all knowledge of it being kept from Black. The evidence is also entirely satisfactory, that Thomas had reasonable cause to believe the firm to be insolvent at the time the judgment was recovered, and the levy was made. Upon the question of insolvency, and of Thomas's knowledge of it, the absence of any testimony from either Thomas or William is a very strong circumstance unfavorable to the *bona fides* of the transaction.

The 39th section of the bankrupt act provides, that, if any person residing within the jurisdiction of the United States, owing debts, provable under the act, exceeding the amount of three hundred dollars, shall, after the passage of

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the act, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, make any transfer of property, or procure or cause or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, he shall be deemed to have committed an act of bankruptcy, and, subject to the conditions thereafter prescribed, shall be adjudged a bankrupt. The section then goes on to provide, that, if such person shall be adjudged a bankrupt, the assignee may recover back the property so transferred contrary to the act, provided the person receiving such conveyance had reasonable cause to believe that the debtor was insolvent. These provisions of the 39th section, as applied to the facts of the present case, are simply to the effect that if William Secor, when the firm of Black & Secor was insolvent, or in contemplation of its insolvency, made a transfer of the property of Black & Secor, or suffered it to be taken on legal process, with intent to give a preference to Thomas P. Secor, as a creditor of the firm, the assignee in bankruptcy of the members of the firm (they having been adjudged bankrupt as such members, and the firm being thus adjudged bankrupt) may recover back the property so transferred contrary to the act, provided Thomas P. Secor had reasonable cause to believe that the firm was insolvent.

Now it clearly appears from the evidence, (1.) That the firm of Black & Secor was insolvent ; (2.) That William Secor, a member of the firm, suffered the property of the firm to be taken on legal process ; (3.) That he did so with intent to give a preference to Thomas P. Secor as a creditor of the firm ; (4.) That Thomas P. Secor had reasonable cause to believe that the firm was insolvent.

First. In regard to the question of *insolvency*, the provisions of the bankrupt act of 1841 were very different from those which are found in the act of 1867. The second section of the act of 1841 declared void all transfers of property made by the bankrupt *in contemplation of bankruptcy*, and for the purpose of giving a preference to any person over general creditors, and all transfers of property made by the

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bankrupt *in contemplation of bankruptcy*, to any person not a *bond fide* creditor, or a purchaser for a valuable consideration without notice, and authorized the assignee in bankruptcy to recover the property transferred; but it expressly provided, that all dealings and transactions by and with any bankrupt, *bond fide*, made and entered into more than two months before the filing of the petition in bankruptcy, should not be invalidated or affected by the act, provided that the other party to any such dealings or transactions had no notice of a prior *act of bankruptcy*, or of the intention of the bankrupt to take the benefit of the act. It was decided by the supreme court in *Buckingham v. McLean*, (13 Howard, 150, 167), that the words "contemplation of bankruptcy," in the second section of the act of 1841, did not mean contemplation of insolvency, — of a simple inability to pay, as debts should

82 become * payable, whereby the business of the debtor would be broken up, — but meant that the debtor must have contemplated the commission of what was declared by the act to be an act of bankruptcy, or must have contemplated an application by himself to be decreed a bankrupt. The view of the court was, that, under the act of 1841, something more than the insolvency of the debtor was required to render void a security given to a *bond fide* creditor more than two months before the filing of the petition, and notice to the creditor of something more than such insolvency; that the word "bankruptcy," as used in the act, meant a particular legal *status*, to be ascertained and declared by a judicial decree; that a person might contemplate insolvency, and the breaking up of his business, and yet not contemplate bankruptcy; and that, as the contemplation of insolvency was not in fact the contemplation of bankruptcy, the phrase "contemplation of bankruptcy" did not include the contemplation of mere insolvency. In these particulars, the 39th section of the act of 1867 differs widely, and with a manifest purpose, from the act of 1841. The words of the 39th section in defining the act of bankruptcy are, "bankrupt or insolvent, or in contemplation of bankruptcy or insolvency." If the debtor is in

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any one of those conditions when he makes the transfer of his property, or procures or suffers his property to be taken on legal process, with intent to give a preference to a creditor, he commits an act of bankruptcy thereby, and is liable therefor to be adjudged a bankrupt; and the assignee may recover back the property so transferred contrary to the act, provided the person receiving the conveyance had reasonable cause to believe that the debtor was insolvent. The words *insolvent* and *insolvency*, as used in the 39th section and elsewhere in the act of 1867, are not synonymous with the words "*bankrupt* and *bankruptcy*," if the latter words have, in that act, the meaning which the supreme court in *Buckingham v. McLean* affixed to them as used in the act of 1841. The former words, in view of such meaning of the latter words, mean something different, and something less restricted. The word *insolvency*, as used in the act of 1867, means what the court in *Buckingham v. McLean* held that the word *bankruptcy* did not mean, and that the word *insolvency* did mean a simple inability to pay, as debts shall become payable, whereby the business of the debtor will be broken up, without any contemplation of the commission of an act for which he can be put into involuntary bankruptcy, and without any contemplation of an application by himself to be decreed a bankrupt. But, if the words *bankrupt* and *bankruptcy*, as used in the 39th section of the act of 1867, do not mean what they meant in the act of 1841, as interpreted by the supreme court in *Buckingham v. McLean*, but mean, in view of the relationship in which they are placed, in that section, to the words *insolvent* and *insolvency*, — "*bankrupt or insolvent, or in contemplation of bankruptcy or insolvency*," — the same thing as the words *insolvent* and *insolvency*, they must have the meaning which, in *Buckingham v. McLean*, the supreme court discarded as belonging to them, and the meaning which that court, in that case, assigned to the words *insolvent* and *insolvency*. In either view, the decisions of the courts under the act of 1841, as to what transfers of property made by a bankrupt before the commencement of proceedings in

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bankruptcy were void, under the 2d section of that act, and the decisions of the English courts as to the meaning of the words "bankrupt," and "contemplation of bankruptcy," have very little, if any, application to the act of 1867.

Second. So, also, in regard to the question of *suffering* property to be taken on legal process the language of the 9th section is, "procure or suffer his property to be taken on legal process." There was no such language in the act of 1841. It was, by the 1st section of that act, made an act of bankruptcy for a person to willingly, or fraudulently *procure* his goods to be taken in execution. The word "suffer," in this connection, was not used in the act of 1841. There is a clearly recognized legal distinction between *procuring* and *suffering*. The act of 6 Geo. IV. ch. 16, sec. 3, provided that if any trader should *suffer* himself to be arrested for any debt not due, or *suffer* himself to be outlawed, or *procure* himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution, he might be brought into bankruptcy. In *Gibson v. King*, 1 Carr. & Marsh. 458, a creditor had brought an action against the bankrupt for a debt, and judgment had been suffered to go by default, and an execution had been issued on it, on which the bankrupt's goods had been taken, and the question arose whether *suffering* the judgment to go by default in the action, and *suffering* the goods to be taken on the execution on the judgment, was *procuring* the goods to be taken in execution, within the statute. The court held, that the bankrupt had *suffered* the goods to be taken in execution, but had not *procured* them to be so taken. The same view of the distinction between the two words in the English act was taken in *Gore v. Lloyd*, 12 M. & W. 463. The distinction there maintained by Baron Alderson was, that the bankrupt *procured* his goods to be taken in execution, when the initiation of the proceeding came from him, when he was the person who began to procure, when he caused the thing to be done, in the ordinary sense of the word; but that the signing reluctantly and under strong pressure from a creditor, of

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a warrant to confess a judgment, under a stipulation that the warrant should not be unnecessarily put in force, was *suffering*, and not *procuring*, goods to be taken in execution which were taken on an execution issued on a judgment entered up on the warrant. The English and other decisions as to pressure by a creditor, and as to what it is to *procure*, have no application to the question of *suffering*. *Denny v. Dana*, 2 Cushing, 160, 170.

Third. As to the question of *intent* on the part of a debtor to give a preference to the creditor, the intent to prefer is essential; but every person is to be presumed to intend the natural and probable consequences of his own acts, and if such acts do in fact give a preference, it is competent to infer the intent. *Denny v. Dana*, 2 Cushing, 160, 172; *Beals v. Clark*, 13 Gray, 18, 21. 9 B. R. 11

When the act which is made the act of bankruptcy is a passive act, such as that of suffering property to be taken on legal process, when the debtor is insolvent or in contemplation of insolvency, with intent to give a preference to a creditor, if the natural and probable consequence of the act of sufferance is to give the preference to the creditor, it will be inferred that the debtor had such intent, unless he shows the contrary; and the burden will be upon him to show the contrary. In the present case, the act of suffering Thomas P. Secor, the creditor, to obtain his judgment and take the property of the firm on legal process thereunder, could have no other effect, if not thwarted, than to give Thomas P. Secor a preference, as such creditor, over other creditors of the firm, and, therefore, William Secor would be held to have intended to give such preference. But, in addition to that, the evidence is such as to show affirmatively that he intended that his suffering the judgment to be recovered should effect the preference. He could have prevented the preference by filing his voluntary petition in bankruptcy, for the adjudication of the firm, and bringing in his copartner. Being able to prevent the preference, he must, not having prevented it, be held to have suffered it, within the meaning of the act.

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Fourth. As to the question whether Thomas P. Secor had reasonable cause to believe that the firm was insolvent, the evidence leaves no fair ground for doubt on the subject.

The same results that follow from the application of the provisions of the 39th section of the act to this case, follow also under the 35th section. The two sections are *in pari materia*, and must be construed together. There is, however, no conflict between them, and they are of the same purport and tenor. Under the 35th section, if William Secor, his firm being insolvent, did, within four months before the filing of the petition against his firm, make any transfer of any part of the property of the firm to Thomas P. Secor, he being a creditor of the firm, with a view to give a preference to him, and if Thomas P. Secor, being the person receiving the transfer, or to be benefited by it, had reasonable cause to believe the firm to be insolvent, and that the transfer was made in fraud of the provisions of the act, the transfer was void, and the assignee may recover the property or its value from Thomas P. Secor. The 35th section also provides, that, if the transfer was not made in the usual, or ordinary, course of business of the debtor, the fact shall be *prima facie* evidence of fraud. The act of suffering the creditor to take the property of the firm on legal process, the firm being insolvent, when such taking could have been prevented by an application in voluntary bankruptcy, was a fraud on the provisions of the act, and was a transfer of the property of the firm to the creditor, within the meaning of the 35th section, and must be held to have been a transfer made by the debtors, and with a view to give a preference to the creditor. The creditor was to be benefited by the transfer, and had reasonable cause to believe the firm to be insolvent, and that the transfer was made in fraud of the provisions of the act. The transfer was not in the usual, or ordinary, course of business of the debtors. Therefore, it was void, and the assignee in bankruptcy is entitled to recover from Thomas P. Secor, the property transferred, or its value. There is no need of a new action for such purpose.

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Thomas P. Secor has submitted himself to the jurisdiction of this court in the premises. It was on his application that the order was made, referring the matter to take testimony as to the facts involved, and directing the proceeds of the property transferred to be held by the sheriff, subject to the further order of this court, to be made on the application of either party, on notice to the other.

The act of 1867 is much more extensive and far reaching in its provisions respecting transactions by a debtor with his creditors, than the act of 1841 was. In respect to the act of 1841, the supreme court, in *Shawhan v. Wherritt*, 7 Howard, 627, 644, said: "The policy and aim of bankrupt laws are to compel an equal distribution of the assets of the bankrupt among all his creditors. Hence, when a merchant or trader, by any of these tests of insolvency," that is, the acts which are made by the statute acts of bankruptcy, "has shown his inability to meet his engagements, one creditor cannot, by collusion with him, or by a race of diligence, obtain a preference to the injury of others. Such conduct is considered a fraud on the act, whose aim is to divide the assets equally, and, therefore, equitably."

These doctrines, thus held to be applicable to the act of 1841, are much more applicable to the act of 1867. And congress, in view of the provisions of the act of 1841, and of the decisions of the supreme court under it, in regard to the meaning of the words "bankruptcy" and "contemplation of bankruptcy," and of the decisions of the courts in the United States and in England in regard to the meaning of the words *procure* and *suffer*, and in regard to the effect of pressure or suit by a creditor upon the question as to whether the debtor procures to be done the act which secures the preference to the creditor, must be regarded as having intended, by the use of the words *insolvent*, and *contemplation of insolvency*, and *suffer*, in the connection in which they are found in the act of 1867, to strike at the root of all preferences obtained by a creditor, when his debtor is insolvent, or in contemplation of insolvency, by the taking of the debt-

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or's property on legal process, whether the taking be by an act of procurement, or an act of sufferance, on the part of the debtor, where there is an intent on the part of the debtor to give such preference, and the creditor has reasonable cause to believe that the debtor is insolvent.

An order must be entered that the sheriff pay over to the assignee in bankruptcy the net proceeds of the sale of the property in question.

Charles H. Smith, for the assignee in bankruptcy; *H. P. Townsend*, for Thomas P. Secor; *Brown, Hall & Vanderpoel*, for the sheriff.

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A bankrupt cannot consult with his counsel or with any one while on the witness stand as to the way or manner he shall answer questions put to him, except when the register, in charge of the case, shall, in the exercise of due discretion, see cause therefor.

In re CURTIS JUDSON.

IN an examination of the above named bankrupt, upon the application of Thomas Hope, a creditor under section 26 of the bankrupt, act, general orders Rule 10, this question has arisen, and the same is certified to his honor, Judge Blatchford, with the facts. The counsel for the creditor propounds a question to the bankrupt under examination, and requires a direct answer. The counsel for the bankrupt claims the right to counsel with, and to prepare and answer for the bankrupt before he answers the question. To this the counsel for the creditor objects, and claims that the bankrupt is a witness, and must be examined as a witness, subject to the same rules and privileges as other witnesses.

This brings up the question: Can a bankrupt during his examination consult counsel, and have his advice as to the answer to be given, or have the answer framed for him by

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his counsel, or can he, while on the stand as a witness, advise with, or consult his counsel as to his answer?

In the state courts in this state, in examination under supplementary proceedings, a practice has grown up of allowing the person so examined to have counsel. The case of *Levey v. Halsey*, 1 Duer, 589, also reported in 1 Code Reports, N. S. 275, is cited as an authority for such practice, but the decision in that case does not authorize any such practice.

By the act of congress, July 16, 1862, it is the practice of the United States district courts to follow the rules of the respective state courts in regard to all questions of evidence, and the examination of witnesses. Since the act of July 16, 1862, parties to the action or proceedings are also witnesses.

The examination of a party to an action or proceeding is a recent innovation upon the common law. In this state, in the year 1818, an act was passed authorizing * 83 the examination of a plaintiff as a witness in certain cases; again, in the year 1820, making plaintiffs competent as witnesses in certain cases. In 1835, an act was passed whereby in suits on bills of exchange and promissory notes the plaintiff was entitled to the testimony of any defendant as a witness. A defendant was also entitled to the testimony of any co-defendant as a witness. In 1850, the act relating to the loss of baggage in railroads was passed, whereby the plaintiff in an action for the loss of baggage could be a witness and prove the loss of the articles, &c.

The passage of the act of 1847, authorizing the examination as a witness of the parties to the action, sections 1, 2, and 3, were as follows: "An act to authorize parties in civil suits, at their election, to obtain the testimony of the adverse party." Passed 1847, chap. 462, p. 630.

"§ 1. Any party in any civil suit or proceeding, either in law or equity had before any court or officer, may require any adverse party, whether complainant, plaintiff, petitioner, or defendant, or any one of said adverse party, any and every person who is beneficially interested in said suit or proceed-

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ings, though not nominally a party, to give testimony under oath in such suit or proceeding; and such adverse party may be examined orally, or under a commission, in the same manner as persons not parties to such suit or proceeding, and who are competent witnesses therein, and such parties may be subpoenaed, and his attendance as a witness compelled, or he may be examined by a commission, or conditionally, or his testimony perpetuated in the same manner as any competent witness.

“ § 2. The court or officer before whom such suit or proceeding may be had, shall have power to dismiss the bill, petition, or proceeding of any party, or any part thereof, with costs, or nonsuit any party, or strike out, or disregard any defence, or any part thereof, of any party who shall refuse to testify.

“ § 3. Any party in any suit or proceeding as aforesaid, shall be required, to entitle him to examine the adverse party as a witness in any such suit or proceeding, to summon such adverse party to attend the trial or hearing in such suit or proceeding, to give testimony therein in the same manner as the attendance of witness in ordinary cases.”

The act of congress July 16, 1862, provides “that the laws of the state in which the court shall be held, shall be the rules of ——— as to the competency of witnesses in the court of the United States.”

The wife of a party to the action, although a party to the suit, could not be compelled to testify as a witness by the defendant, by the state law. 5 Barbour, 156. But by the act of May 10, 1866, she now can be, and under the bankrupt act she can be subpoenaed as a witness, and unless she testifies as per section 26 of the bankrupt act, the husband cannot be discharged.

In 1849, the Code of Procedure was enacted. By section 292, a judgment debtor could be examined in the same manner as any other witness by that act; the examination of a party was the same as the examination of a witness; same by all the previous statutes.

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By a careful perusal of section 26 of the bankrupt law, the act of this state, 1847, sections 1, 2, 3, and of section 292 of the Code, it is fair to infer that section 26 of the bankrupt law, as well as General Orders in Bankruptcy, Rule 10, were founded upon the act of New York, 1847, and the Code, section 292, consequently the same rules as to the taking of the testimony of parties to an action or proceeding, should govern the examination of witnesses in the United States district courts. The bankrupt is examined as a witness at the instance of the creditor, who is the adverse party.

The examination of a bankrupt is an examination in open court upon the trial of the cause, and must of necessity be an oral examination; and it is in the discretion of the court to allow the bankrupt counsel on an examination, even the counsel of record in the cause. *Peabody v. Harman*, 3 Gray, 113.

I hold that the bankrupt must be examined as a witness, the same in all respects as if examined as a witness in any cause on trial in the district court. Counsel may raise any objection, or take any exceptions, the same as at a trial in the district court. But the witness, be he the bankrupt or any other witness, cannot during such examination consult with counsel, or receive advice or suggestions from any person.

The counsel for the bankrupt should be allowed to examine him as to any matter pertinent to his examination by the creditor. 1 New York Legal Observer, 119, or as to any matter set forth in the schedule.

Bankrupts are unwilling witnesses. Their examination should be full, fair, and searching, not irrelevant; *Ex parte Legge*, 17 Jurist, 415; should relate to all matters tending to show the bankrupt to have property other than that mentioned in the schedules. Page 20, Manual of the U. S. Bankrupt Act, and the case there cited, 1 Duer, 589. He must answer all questions touching or concerning his property, or any question tending to show he has property, interest in property, or rights in action not mentioned in his schedules.

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as required by the bankrupt act, and rules therein. The schedules are his direct examination, and his examination by the assignee or creditor is a cross-examination.

In this case the bankrupt is attended by two good lawyers, who claim the right to consult the bankrupt as to his answers, and to frame them for him, and cite the Patterson case, 1 Duer, 589, and Law Rep. 514. Register Dwight, held, "That in his opinion the bankrupt should have the privilege of consulting with his counsel while under examination, provided that such consultation does not cause delay in the proceedings;" and the judge held, "Within the limits above stated by the register, that is, to the extent of allowing to the bankrupt the privilege of consulting with his counsel while under examination, provided such consultation does not cause delay in the proceedings, the register is the proper judge of the propriety of allowing to the bankrupt such privileges, and the court will not interfere with the exercise of such discretion in ordinary cases."

In this case, I hold that the counsel's consultations with the bankrupt during the examination, and also in part preparing the answer of the bankrupt in this cause, does cause delay in the proceedings, also hinders and impedes the proceedings, causing much delay, but not more so than consultations with counsel and the preparation of answers necessarily require. To the courts allowing counsel to the bankrupt on his examination, counsel for the creditor is strenuously opposed, citing 3 Gray, 113, as authority to the contrary; and it is evident that if the bankrupt can have counsel to prepare his answers to the questions asked him, the examination must be greatly impeded, and the examination prolonged to an intolerable length; the examination of the bankrupt becomes the examination of his counsel, which would at once defeat the intention of the law, and render the examination of a bankrupt under section 26 of the bankrupt act a mere farce. Some rule should be adopted whereby the rights of a bankrupt under examination should be defined and definitely settled, and the way in which a bankrupt should be examined minutely specified.

In re Curtis Judson.

In this case I hold the examination of the bankrupt under section 26 of the act and General Orders, Rule 10, shall be conducted in all respects before me at the chambers of this court as if the cause was in progress of trial before the judge of the district court.

That the bankrupt, Curtis Judson, must take the stand as a witness, must answer the questions without advice or consultation with any person while on the stand as such witness. And that the bankrupt cannot consult with his counsel, or with any one, while on the stand as a witness, as to the way or manner he shall answer the questions put to him.

Since writing the above opinion, I have seen the opinion of Judge Lowell, United States district court, Massachusetts, in the *Matter of Edward P. Tanner*. The court held that a bankrupt under examination has no right to consult with his counsel, except when the magistrate before whom the examination is conducted, has good cause for allowing it. 1 N. B. R. 59, *quarto*. His opinion is very full, and covers the point taken in this case by the counsel for the bankrupt.

The counsel for the bankrupt except to the ruling of the register, and ask that the same be certified to your honor.

Respectfully submitted,

JOHN FITCH, *Register*.

BLATCHFORD, J. I have carefully examined the decision of Judge Lowell, in the *Case of Tanner*, 1 N. B. R. 59, *quarto*, and concur fully in his views in all respects as there expressed.

The clerk will certify this decision to the register, John Fitch, Esq.

March 15, 1860.

In re Henry C. Bolton.

U. S. DISTRICT COURT, S. D. NEW YORK.

A creditor having security, may prove his claim to an amount exceeding the value of such security, without abandoning the same. He is, however, bound to set forth the value of his security, in order to vote as a creditor, in respect to the overplus proven by him, upon the choice of assignee.

In re HENRY C. BOLTON.

I, EDGAR KETCHUM, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings, in said cause before me, the following question arose, pertinent to said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Mr. E. Y. Bell, who appeared for the bankrupt, and Mr. W. W. Wiltbank, who appeared for certain creditors of the said bankrupt:

“It is controverted by the counsel for the bankrupt, but on the part of counsel for certain creditors it is claimed, that a creditor having a pledge of personal property, given to him by the bankrupt and a third person in the course of their business as copartners, co-trading, or a lien thereon for securing the payment of a debt owing to said creditor from the said bankrupt, should be admitted at a meeting of the creditors of the debtor to prove their debts and choose one or more assignees of his estate, held at a court of bankruptcy, in accordance with the provisions of the 11th and other sections of the act of congress, March 2, 1867, to prove his whole debt without, by so doing, abandoning his security, losing his lien thereon, or forfeiting his right to the same.”

I am of opinion that the creditor having security may prove his claim to the amount exceeding the value thereof, without abandoning the same. But I think the creditor is bound to set forth the value of his security, and that he may vote as a creditor, in respect to the overplus proven by him, upon the choice of assignee.

EDGAR KETCHUM, *Register.*

In re William Griffen.

BLATCHFORD, J. The view of the register is correct.

The clerk will certify this decision to the register, Edgar Ketchum, Esq.

March 7, 1868.

U. S. DISTRICT COURT, S. D. NEW YORK.

The wife of a bankrupt is entitled to witness fees for attendance and travel. Such fees are to be those prescribed for witnesses by the 3d section of the fee bill, act of February 26, 1853.

The fees of a witness must be tendered or paid to him at the time of the service of the summons or a subpoena.

If there be an adjournment, the witness must be paid for another day's attendance, before he is bound to attend on the adjourned day.

In re WILLIAM GRIFFEN.

IN this case Register Beale certifies to the judge, that in the due course of proceedings the following questions, pertinent to the same, arose, and were stated and agreed to by the counsel for the opposing parties, to wit: Mr. John P. H. Tallman, who appeared for the bankrupt, and Mr. Alland Anthony, who appeared for Henry Bostwick, one of the creditors of said bankrupt. The bankrupt's wife was required to attend before the court to be examined as a witness under section 26 of the act, at the request of the opposing creditor; she thus attended once a week for five weeks, and was sworn on the last day. It appears she resides fourteen miles from the place of trial, and travelled this distance each time, requiring seven days. The payment of the following bill is asked in her behalf, as a witness, to wit: Attended court 5 times; 7 days necessary absence from home, at \$1.50, \$10.50; travelled 28 miles 5 times, 150 miles, at 5 cents, \$7.00. The creditor refuses to pay the bill.

Question 1st. Is the wife of the bankrupt entitled to any pay as a witness under section 26?

Question 2d. If so, on what principle? Is she entitled to fees for more than one day's attendance and travel?

In re William Griffen.

Question 3d. How is payment in such case to be enforced?

And the said parties requested that the same should be certified to your honor for your opinion thereon.

On these questions the register also certifies his opinion.

First. That the wife of the bankrupt, although appearing in obedience to an "order" instead of a "summons," still being "examined as a witness," is entitled to fees the same as any other witness.

Second. I am of opinion that such fees should be at the following rates: Travelling fees five cents per mile from her residence to the place where the examination was conducted, and \$1.50 per diem for each day's actual attendance as such witness, until such examination shall have been completed.

Third. I am of opinion that the payment of such fees is to be enforced as in ordinary actions, and according to the practice of the court.

BLATCHFORD, J. *First.* The wife of the bankrupt is entitled to witness fees for attendance and travel, the same as any other witness.

84 * *Second.* Such fees are to be those prescribed for witnesses by the 3d section of the fee bill, act of February 26, 1853. General Order No. 29 provides that the fees of witnesses shall include their travelling expenses to and from the place at which they may be summoned to attend. This means no more than the travelling fees allowed by the act of 1853. But if the witness was, by adjournment of the examination, obliged to attend at intervals, and it was reasonable for her during the intervals, to return to her residence, she is entitled to travelling fees at five cents per mile for going and returning, as often as she went and returned, and to \$1.50 for each day's attendance before the register.

Third. By General Order No. 29 the fees of a witness must be tendered or paid to him at the time of the service of the summons or subpoena. The fees so to be tendered or paid at the time of such service, are the fees for going and returning once, and for one day's attendance. If there be an adjourn-

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ment, the witness must be paid for another day's attendance before he is bound to attend on the adjourned day. And if it is reasonable for him to return to his residence, to be judged of by the register, he is entitled to be paid his travel fees for going and returning a second time, before he is bound to come a second time. If the fees are not so paid, and the witness, nevertheless, attends, the payment of the fees is to be enforced as in ordinary actions, and according to the practice of the court therein.

The clerk will certify this decision to the register, Charles L. Beale, Esq.

March 11, 1868.

U. S. DISTRICT COURT, MASSACHUSETTS

Where a firm consisting of two partners carries on business in the name of the active partner, a promissory note given by him to the silent partner, for the amount of capital contributed by the latter to the joint stock, is the separate note of the active partner.

Where such a firm, being insolvent, and known by the partners to be so, is dissolved, and the silent partner conveys all his interest in the joint property to the active partner, who on the same day, and as part of the same transaction, mortgages the whole stock in trade to secure the preëxisting debt of a separate creditor of each partner, and neither partner had any separate estate: *held*, this transaction is fraudulent, in the sense of the bankrupt law, as a preference; and both partners are liable to be adjudged bankrupt on the petition of a joint creditor, seasonably filed.

In re WALTER H. WAITE & E. J. CROCKER.¹

THIS was a petition by joint creditors of Walter H. Waite and E. J. Crocker, lately partners, trading under the name of Waite alone, that they might be adjudged bankrupts, and was filed October 15, 1867.

The evidence showed that E. S. Jaffray & Co., the petitioning creditors, had encouraged Waite to set up in Boston a business in which he had had long experience as a clerk and salesman, and had lent him five thousand dollars as his

¹ Lowell's Decisions, vol. 1, p. 207.

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capital, on his promise to procure a partner who should put in an equal amount ; and they further promised, if this should be done, to give the firm a long "line" of credit. Crocker put in six thousand four hundred dollars, which he borrowed of Mrs. Badger, his wife's mother, and took Waite's notes therefor, on demand, which he at once indorsed to Mrs. Badger ; and he wrote the petitioners that he was a general partner, though his name would not appear "at first" in the firm, for reasons which he gave. The petitioners sold a large amount of goods to Waite, on credit, the price of which was admitted to be the joint debt of the firm, and their debt was larger than those of all others together.

Crocker took no active part in the business, and had no property of his own, and no experience in this kind of business. Nor had Waite any separate estate.

A short time before the joint debt to the petitioners came due, Crocker urged Waite to take an account of stock, and make an exhibit of the state of the partnership business. Waite did this, after much importunity on Crocker's part, and the account was finished and examined by the parties on the 23d of September, 1867. Crocker testified that on seeing the account he was dissatisfied with the small amount of sales, and the large amount of Waite's personal expenses, and proposed a dissolution of the firm, which was agreed to. Waite's statement was that Crocker said he was unwilling to let the money lie longer without security, and that, hoping to get a new partner, he agreed to give security. They went immediately to the office of Crocker's attorney, where a formal dissolution of the firm was drawn up and executed, by which the whole stock, &c., was made over to Waite, and he agreed to pay the joint debts. On the same day, and as part of the same transaction, Waite's notes, held by Mrs. Badger, were given up, and he made out new notes directly to her for the whole amount of the old notes, and the interest due on them, payable one third on demand, one third in four months, and one third in eight months, with interest, and secured them by a mortgage on the whole stock in trade, furniture,

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and fixtures. This mortgage was the act of bankruptcy relied on by the petitioners.

T. H. Sweetser & E. H. Abbott (*T. F. Nutter* with them), for the petitioners.

B. T. Brooks, for Crocker, and *A. A. Ranney*, for Waite.

Partners may dissolve their connection when they please, and whether they are insolvent or not, and their acts in this respect will be upheld by the courts. *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 Ves. 3; *Howe v. Lawrence*, 9 Cush. 553; *Robb v. Mudge*, 14 Gray, 534.

There was no fraud in fact intended in this case.

LOWELL, J. It is evident that the defendants were insolvent in the technical sense on the 23d of September, for they had no ready means to meet the large debts presently to fall due; and they were aware of this state of things, and discussed the means for obtaining an extension of time. If so, a mortgage of the whole stock in trade to a preëxisting creditor would be *prima facie* a preference. In England such a mortgage to a preëxisting creditor has always been held to be fraudulent *per se*, where it is of the whole stock, or of so much as will produce insolvency. *Wesley v. De Mattos*, 1 Burr. 467; *Newton v. Chandler*, 7 East, 138; *Seibert v. Spooner*, 1 M. & W. 714; *Lindon v. Sharpe*, 6 M. & G. 895; *Graham v. Chapman*, 12 C. B. 85; *Smith v. Cannon*, 2 Ellis & B. 35. I do not say that under our statute such a mortgage is conclusive evidence of a technical fraud; but it is very strong evidence, because it is out of the ordinary course of business, and is of itself enough, if duly recorded, to destroy the credit of any trader, and therefore would not be resorted to by one who had readier means of paying the debt.

There is the further circumstance that Mrs. Badger was not a joint creditor as to the larger part of her debt. Crocker says he does not know whether the notes given him by Waite were intended to be joint or separate; but Waite says they were separate; and they must have been so, because they were given for capital contributed by Crocker, and he

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would not promise himself to repay it. The notes, being on demand, were subject, by the laws of Massachusetts, to the same equities in the hands of Mrs. Badger that would have affected them in Crocker's, and as he was her agent, she would be bound by his knowledge, whatever had been the form of the notes. Here there is a mortgage of all the joint estate to secure a separate debt, neither partner having any separate property. This appears a preference on the face of the transaction, and the evidence rather confirms the inference than removes it. But it is said that partners may lawfully dissolve their firm, even if they are insolvent, and that their creditors will be bound by their action, though it should have the effect to convert joint into separate property to the injury of a large class of creditors. The courts have certainly gone a great way in sanctioning the dissolution of partnerships, and have held to what appears to be the logical consequences of the dissolution. But every such judgment which I have seen is qualified by the condition that the act itself should have been done in good faith. Here the evidence is very strong that good faith was wanting. The partnership articles have been destroyed, and their contents, excepting in one particular, have not been disclosed. It appears, however, that Crocker urged the taking of the account before the regular time of accounting, according to the articles, had come; that he acted throughout, not as a partner, but as agent for Mrs. Badger, and with a view to her interests; and I consider it the fair result of the whole conduct of the parties, that he never intended to risk his mother's capital, but intended to get security for it whenever he should have occasion to fear eventual loss. He had no property of his own, and no interest to dissolve the firm, but some interest to continue it with a view to possible profits.

Under the peculiar circumstances of this case, the dissolution of the partnership was a fraud on the statute, and rather an incident to a scheme for giving one creditor a preference, than a *bona fide* copartnership act. Indeed, the mere dissolution itself would work a preference to the separate creditors

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of Waite, by converting the joint into separate assets; and where such a result is contemplated, and is the motive or one of the motives of the act of dissolving a firm, the act is voidable by the joint creditors, whether the result must be worked out through a bankrupt law or through the attachment laws of a state. *Ex parte Shouse*, Crabbe, 482; *Ferson v. Monroe*, 1 Foster (N. H.), 462.

Under the bankrupt act of 1841, a transaction which was relied on as a preference by a debtor, must have been done in contemplation of becoming bankrupt under the statute; though such contemplation might have been inferred from circumstances like those which this case discloses: *Buckingham v. McLean*, 13 How. 150. The law of 1867 is not thus limited, and requires only that the debtor, being insolvent, should do the act, with intent to prefer (see sections 29, 35, 39); which implies, undoubtedly, that the debtor expected that some advantage would accrue to the favored creditor over the rest; that is, he must have thought it probable or possible that he should not pay all in full. Under every system of bankruptcy, such facts as appear in this case would be ample proof of the intent.

Such a mortgage, given with intent to prefer, may be charged either as a preference or a conveyance to delay and hinder creditors, for it is both. And the creditors may well enough rely on the mortgage or on the dissolution of the firm, or on both; for it was all one transaction, and all fraudulent in the technical sense, as a preference in bankruptcy, though at common law and in equity the securing a just debt is no fraud.

This case does not raise the question whether partners can be adjudged bankrupt for anything done or omitted after they have dissolved their connection, because the act of bankruptcy was contemporaneous with the dissolution and a part of the same transaction. I have no doubt that a joint voluntary petition may be maintained so long as there are joint debts outstanding, but here it is only necessary to decide that

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a fraudulent dissolution will not oust the jurisdiction of a joint petition *in invitum*, and that I decide.

Adjudication ordered.

February, 1868.

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An insolvent debtor commits an act of bankruptcy by confessing judgment, and allowing his property to be taken on an execution issued thereupon, with intent to give a preference to a creditor. His insolvency or contemplation of insolvency must be averred and shown.

Where the averments of a petition are defective it may be amended, and judgment will be suspended to allow the amendment.

In re ASA W. CRAFT.

BLATCHFORD, J. In this case a petition was filed by Hoyt, Carter & Co., August 28, 1867, praying that Craft be declared a bankrupt. The petition sets forth as alleged acts of bankruptcy, that Craft "did, in contemplation of bankruptcy, give to one Samuel Jones, one of his creditors, on the 3d day of July, 1867, a confession of judgment, and, on said day, caused a judgment to be entered thereon, for the sum of \$7,088; and on said day an execution issued thereon to the sheriff of the city and county of New York;" also, that Craft "did, in contemplation of bankruptcy, give to one Lewis Van Doren, one of his creditors, on the 17th day of August, 1867, a confession of judgment, and, on said day caused a judgment to be entered thereon, for the sum of \$548.77, and, on said day, an execution issued thereon, to the sheriff of the city and county of New York; that said confessions of judgments, and each of them, were given by said Craft to said creditors, with the intent to give a preference to the said Samuel Jones and Lewis Van Doren, two of the creditors of said Asa W. Craft, and with the intent to defeat or delay the operation of the bankrupt act, that the sheriff of the city and county of New York, under and by virtue of said executions, levied on and took the property of

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the said Asa W. Craft, and has sold the said property to pay and satisfy the said executions in favor of said Jones and Van Doren ;" and " that the proceeds of the sale of said property amounted to over the sum of \$5,100, which has been paid out by said sheriff to said Samuel Jones, in part satisfaction of said judgment of said Jones against said Asa W. Craft."

On the return of the order to show cause on the petition, the debtor denied the acts of bankruptcy set forth in the petition, and demanded a trial by the court, and thereupon an order was made, under section 38 of the act, referring it to a commissioner of the circuit court to take and certify to the court all such evidence and testimony as should be offered before him on the part of the creditors or debtor in the matter, upon the issues raised by the petition and denial. The commissioner has taken and reported the testimony, and the case has been argued thereon by the counsel for the respective parties.

The testimony consists mainly of copies of the confessions of judgment named in the petition, and of the depositions of the deputy sheriff, who levied on the property of the debtor and sold it under the Jones judgment, of the attorney for Jones, who procured the Jones judgment to be confessed, of Craft, the debtor, and of Jones, the creditor.

The confession of judgment in the Jones case is in the usual form, under the laws of New York, of a statement signed and sworn to by Craft, July 3d, 1867, setting forth the consideration of his debt to Jones and its amount — \$7,083 — and confessing judgment in favor of Jones for that amount. On this a judgment was entered upon the same day for that amount, and \$5 costs, in all, \$7,088, in the supreme court of New York. On the same day, an execution was issued on the judgment to the sheriff of the city and county of New York, on which he levied on sundry personal property of Craft's, which he afterwards sold on the execution. The net proceeds of the sale amounted to \$4,517.64, and were applied on the execution. The sheriff could find

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no other property of Craft's on which to levy, to make the balance of the Jones execution, or to make anything on an execution which was issued to him on the Van Doren judgment. The testimony is full to show that Craft was deeply insolvent when he confessed the Jones judgment, and that after the sale of his property under the Jones execution, he had no property whatever with which to pay his debts. The confession of the Jones judgment was made by Craft under pressure from Jones, the debt having been one of long standing, and frequent demands for payment of it having been made by Jones, and legal proceedings on it being threatened by Jones, and he also threatening to foreclose a chattel mortgage which he held on some of Craft's property. The proposal to confess the judgment did not emanate from Craft, but from Jones. Nothing was said between the parties about bankruptcy. Craft did not contemplate bankruptcy, and did not know there was such a law as the bankrupt law. The debt to Jones was in all respects *bond fide* and fully due.

These facts make out a case fully within section 39 of the act. Craft, being insolvent, suffered his property to be taken on legal process, with intent to give a preference to Jones, as a creditor. He could have prevented the taking of his property on legal process by going into voluntary bankruptcy; and, being insolvent, it was his duty to have done so. By not doing so, and by confessing the judgment to Jones, and allowing Jones to take his property on the execution issued on the judgment, Craft suffered his property to be taken on legal process. The result of this was to give a preference to Jones. The presumption of law is that Craft intended to effect this result. It is for him to rebut that presumption. He has not done so. On the contrary, all the circumstances of the case corroborate it.

The views of this court as to the proper interpretation to be given to the 39th section of the act, in a case of this kind, have been fully stated in its decision in the recent *Case of Black & Secor*, N. B. R. *quarto*, vol. 1, p. 81. The doctrine strongly urged on the part of the debtor in this case, on

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the authority of the cases of *Ogden v. Jackson*, 1 Johns. 370; *Locke v. Winning*, 3 Mass. 325; and *Phœnix v. The Assignees of Ingraham*, 5 Johns. 412, has no application to the provisions of the 39th section of the act of 1867, which are involved in the present case. It has no application to the case of an insolvent's suffering property to be taken on legal process, with intent to prefer a creditor. Those cases were all of them cases under the bankrupt act of 1801. That act required, in order to make an act of bankruptcy, that the person should, with intent unlawfully to delay or defraud his or her creditors, willingly or fraudulently procure his goods, money, or chattels to be taken in execution. It did not require that the person should be bankrupt or insolvent, or should do the act in contemplation of bankruptcy or insolvency, and it required that there should be a *procuring* by the debtor, and not merely a *suffering*.

The act of 1841 required, to make the act of bankruptcy, that the debtor should willingly or fraudulently procure his goods and chattels to be taken in execution. The act of 1867 requires that the debtor, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, should procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors. In *Ogden v. Jackson* the court held that the debtor contemplated an act of bankruptcy, thus, in effect, holding that the act of 1801 required that he should contemplate such an act. In *Locke v. Winning* the court held the same view. Chief Justice Parsons, in that case, says: "Until an act of bankruptcy is committed, the bankrupt has the exclusive right to dispose of his effects at his pleasure, so that the disposition be *bond fide* and not fraudulent." This is true; but where the being insolvent, and suffering his property to be taken on legal process, with intent to prefer a creditor, is made the act of bankruptcy on the part of the debtor, there the disposition of the property being, with the attendant circumstances, the act of bankruptcy, he has no right so to dispose of it. In *Phœnix v. The Assignees of Ingraham*, the court held that, though the

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debtor was insolvent, he did not contemplate bankruptcy, and took the view that, under the act of 1801, an insolvency was no objection to giving a preference, unless it were shown that a bankruptcy was contemplated at the time, on the ground that every man has a right to dispose of his property to whom he pleases, for an adequate consideration, and in satisfaction of his debts, until he commits an act of bankruptcy or contemplates so to do. The court also held that, even if an act of bankruptcy was contemplated by the debtor, yet if, at the instance and on the application of the creditor he made payment or assigned property, such payment or assignment was valid. The doctrine of these cases, and of like cases under the act of 1841, and of English cases on provisions like those in the acts of 1801 and 1841, is done away with by the express provisions of the 39th and 35th sections of the act of 1867. The cases to which I have referred were cases in reference to the validity of payments and transfers, and

90 the present question concerns the question, * What is an act of bankruptcy? But both questions are so interwoven together, in the 39th and 35th sections (the committing of an enumerated act of bankruptcy, through a transfer of property by affirmative action, procuration, or sufferance being made a ground for adjudication, as a fraud against the act, and the transfer being also made void, as being such a fraud), that the views on the one question apply very much to the other. There are, indeed, grounds for adjudication of bankruptcy specified in the act of 1867 which cannot involve any question of the transfer of property, as, for instance, departure from the state of which the person is an inhabitant, with intent to defraud creditors, and other grounds. But the general remark is true; and, as the act of 1867 is so different from the acts of 1801 and 1841 in the particulars under consideration, the decisions under the latter two acts, as to the grounds for adjudging a debtor to be a bankrupt, and for setting aside, as void, a previous transfer of property by him, have very little application to the provisions of the act of 1867 in those particulars.

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It was strongly urged, on the part of the debtor, that the preference must be voluntary, and that, if there is any pressure by the creditor, it is not voluntary. This may be so as respects an affirmative act of transfer or of procuration. But it is not so in regard to an act of sufferance.

The 39th section defines four species of acts for which, when done by a person bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, with intent to give a preference to one or more of his creditors, he may be put into bankruptcy. They are; first, making a transfer of his property; second, giving a warrant to confess judgment; third, procuring his property to be taken on legal process; fourth, suffering his property to be taken on legal process. So far as the first, second, and third of these are concerned, the provisions are old, and existed in the former bankrupt acts. And they require affirmative voluntary action by the debtor; and the decisions under the former laws may, perhaps, apply, to the effect that pressure by a creditor deprives the acts of the debtor of their voluntary character. But the act of 1867 adds the fourth act of bankruptcy—suffering property to be taken on legal process. This was added for a purpose, and with an intent. To say that there cannot be a suffering where there is pressure by a creditor, is to destroy the plain meaning of the word. To suffer or permit implies pressure and action from without. Pressure being thus an inherent element of sufferance, to say that where there is pressure there can be no sufferance, is to utter a fallacy. Where a person permits what he can prevent, he suffers or allows the thing to be done, whether he is threatened or pressed, or not. A debtor who is threatened or pressed can prevent the taking of his property on legal process by going into voluntary bankruptcy. If he does not, he clearly suffers or allows or permits the taking.

In *Gore v. Lloyd*, 12 Mee. & W. 480, it was held, that giving under pressure, a warrant of attorney to confess a judgment under which goods were taken on execution, was not procuring, but was suffering the goods to be taken on execution; and, in *Gibson v. King*, 1 Carr. & Marsh. 458,

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it was held that allowing a judgment to go by default was suffering goods to be taken in execution which were taken under the judgment, and was not procuring them to be so taken.

With these views, nothing would remain but to decree an adjudication of bankruptcy against Craft, but for the fact that the petition of the creditors is defective in its allegations. It sufficiently avers that Craft suffered his property to be taken on legal process, with intent to give a preference to Jones, as a creditor, but it nowhere avers that Craft committed this act of sufferance when he was insolvent or in contemplation of insolvency. The petition does not aver that he is, or was, insolvent, or contemplated insolvency. It merely avers that he did the acts alleged in "contemplation of bankruptcy." Those words as used in the bankrupt act of 1841, were defined by the supreme court in *Buckingham v. McLean*, 13 Howard, 150, 167, to mean, in contemplation of committing what was made by the act an act of bankruptcy, or of voluntarily applying to be decreed a bankrupt. I think they have the same meaning as used in the 39th section of the act of 1867. In such sense, Craft did not commit this act of sufferance in contemplation of bankruptcy. It will not do to say that the act of making a transfer of property, or of procuring or suffering property to be taken on legal process, with the intent named, is an act of bankruptcy, whether the debtor is, or is not, otherwise shown to be bankrupt or insolvent, or to be contemplating bankruptcy or insolvency, on the idea that the act becomes, *ipso facto*, one in contemplation of bankruptcy, because it being an act of bankruptcy, and thus being bankruptcy, the doing of it must have been in contemplation of bankruptcy. This is reasoning in a circle, and such a view would not require that the debtor should even be *insolvent* or contemplate *insolvency*, and would virtually strike those words out of the section; for if it were shown that the debtor had done the act named, with the intent named, the fact that he had done it in contemplation of bankruptcy would follow as an inevitable legal conclusion, and insolvency, or the contem-

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plation of it would never become an operative prerequisite. The debtor must be shown, aside from the mere doing of the act named, with the intent named, to have done it when bankrupt or insolvent, or in contemplation of bankruptcy or insolvency. The only averment in this regard, in the petitions in this case, being, that the acts done were done in contemplation of bankruptcy, and that averment not being sustained by proof that they were done in contemplation of bankruptcy, the petition is not sustained. Yet all the facts set forth in the petition are found to be true, except the fact that the acts therein alleged to have been done were done in contemplation of bankruptcy. The additional fact is also found to be true, that those acts were done when the debtor was insolvent. The facts set forth in the petition, and such additional fact, make out a clear case for adjudging the debtor to be a bankrupt, and to have committed an act of bankruptcy before the filing of the petition. The additional fact is not one that takes the debtor by surprise. He was fully examined, without objection on his part, on the taking of the testimony, as to his debts and property, with a view to showing that he was insolvent at the time the acts set forth in the petition were done.

The case, therefore, is a proper one to suspend a decision on the issue joined, and allow the petitioners to apply to amend their petition in the particular suggested. The fact that the creditors pursued the line of testimony indicated, without objection from the debtor, shows either that the parties labored under a misapprehension as to what the petition averred, or else were under the belief that the averment of contemplation of bankruptcy was the equivalent of an averment of contemplation of insolvency, and not more restricted. In either view, an amendment of the petition is proper to prevent a failure of justice.

The decision on the petition and denial is therefore suspended, to allow the amendment suggested.

Benedict & Boardman, for the creditors; *Edwin James*, for the debtor.

In re William S. Walker.

U. S. DISTRICT COURT, MASSACHUSETTS.

Where a bankrupt, born in Boston, became domiciled in California, but left that state with no intention of returning, and after staying without the United States several months, returned to Boston, and in less than two months thereafter filed his petition in bankruptcy : *held*, that the act of leaving California with no intention of returning, at once revived the domicil of origin, and a petition filed in this district cannot be vacated for want of jurisdiction, notwithstanding that the bankrupt has not resided within the district for the greater part of the six months next preceding the filing of the petition.

In re WILLIAM S. WALKER.

LOWELL, J. A creditor petitions to vacate all proceedings in this cause for want of jurisdiction, averring that the bankrupt had not resided in this district for the greater part of the six months next preceding the filing of his petition, as alleged by him and required by law. The adjudication of bankruptcy by the register, being *ex parte*, is not conclusive of this point, and this mode of reviewing it has not been objected to.

The petition to vacate was by consent referred to the register, Mr. Rogers, who has heard the parties and reported his findings of law and fact, together with the evidence; and neither party has desired to be heard in argument. The law wisely provides that proceedings in bankruptcy should be taken in the place where the debtor resides or has his place of business; and to prevent sudden and fraudulent changes, that if he has had two such homes within six months, he must proceed in the district where he has been domiciled the longest. It is not always an easy matter to determine where a person does, in legal contemplation, reside. Mere causal absence for business or pleasure will not change the domicil, though it may change the place of business; and one whose domicil is here may institute proceedings here, though he may have been staying abroad or in another district during the whole of the six months. When a person has been trading and travelling in several parts of the world, as has this debtor, the question is often one of delicacy and

In re William S. Walker.

difficulty. In the present case it is complicated by a serious conflict of evidence. No question arises concerning the place of business, because he had none within the United States during any part of the six months.

The bankrupt, who is unmarried, was born in Boston, and has lived here for the greater part of his life. There is a house here, that of some near relative, as I suppose, where he usually stays. During some years he traded in several of the western states, and the register finds the weight of evidence to be that he was domiciled in California a part of the time, including September, 1866. He left that state in November, 1866, and he swears that he had no intention ever to return thither, and that he left no property, business, or connections there; he was next in Paris and France for about eleven months, and left France for Boston in November, 1867, and arrived here on the 11th of December; he was arrested early in January at the suit of this petitioner, and has been imprisoned ever since; on the 29th of January he filed his petition in bankruptcy. The register finds that he came to Boston intending to remain; he reports in favor of the jurisdiction, on the ground that the debtor resided in Boston for the longest period of the six months that he had any actual residence anywhere. I affirm the report, though not for the precise reason given by the register.

If Walker was domiciled in California until the 11th of December, he cannot, whatever the hardship of his case, become bankrupt in Massachusetts on the 29th day of January; such a construction of the word "resided" is inconsistent with the statute and the reasons of it; but upon the evidence and the finding, he must be considered as domiciled here from November 19, 1866, the day on which he sailed from San

Francisco, to this time. The general rule is, that a
12 domicil once acquired remains until a removal * has been
 effected to some other place with intent to remain
there. But there is an important exception in favor of the
native domicil, that by which a mere removal from the new
or acquired home with intent to return to that of origin, re-

In re William S. Walker.

vives the native domicil *eo instanti*. Story Conflict of Laws, § 47; *The Venus*, 8 Cranch, 253; *The Indian Chief*, 3 Rob. 12. Of course the abandonment of the acquired domicil must be absolute and final; *Cragie v. Cragie*, 3 Curtis, 435; but if it be so, the domicil of origin revives. It is of no consequence that the return home is not immediate, or by the shortest road. If the fact of a final abandonment of the new, and the intent to return to the old concur, the domicil is changed from the time that the new is actually left. See the *Case of Mr. Curtiss*, cited 3 Rob. 21, note (a), who stayed four years in Holland, the enemy's country, on his return from *Dutch* colonies, but whose property was restored on the ground that his English domicil revived when he left the Dutch colony. Mr. Westlake states this exception with some hesitation, but finds it supported by authority. Westlake, Private Intern. Law, p. 39 (§ 40). So, in this case, the return by way of France, and the stay of eleven months there for a temporary purpose, does not prevent the operation of this principle. The weight of the evidence is that Walker never intended to return to San Francisco, but left that city intending to resume his home here, which indeed he says he never had given up (but upon this point I follow the register who saw the witnesses). I must conclude that the debtor was a resident of Boston in the sense of the bankrupt law, during the whole of the six months next preceding the filing of his petition.

Petition to vacate proceedings dismissed.

C. S. Lincoln, for petitioner; *A. W. Boardman*, for bankrupt.

In re J. McClellan.

U. S. DISTRICT COURT, KENTUCKY.

The 20th section of the bankrupt act confers authority on the assignee to make a sale of incumbered property without any order of court.

When, however, the debt claimed by the creditor is not admitted by the assignee, and cannot be agreed between them, then the assignee should resort to the proper court to ascertain it, and for a sale of the property at the same time.

In re J. McCLELLAN.

BALLARD, J. This is an application to the court by the assignee for authority to sell one hundred and twenty-seven and three quarters acres of land, part of the estate of the bankrupt, subject to a lien thereon for "about two thousand dollars."

The note to Form No. 34, prescribed by the justices of the supreme court, contemplates that such a petition may be presented to the court by the assignee; but in my opinion the assignee may make such sale without any order of court, and therefore the order prayed for will not be made.

It may be difficult to derive the authority from either the 14th or the 15th sections of the bankrupt act; but surely it cannot be doubted that the 20th section expressly confers it.

This section, among other things, provides that "if the value of the property (covered by mortgage, pledge, or lien) exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein, on receiving such excess; *or he may sell the property, subject to the claim of the creditor thereon.*" This language is too explicit to admit of any doubt in construction.

But, clear as is the authority of the assignee to sell mortgaged property subject to the mortgage, I think it is an authority which should not always be exercised. Ordinarily persons prefer to purchase property free from incumbrance. They fear that questions may arise in respect to the amount of the incumbrance, and that they may have difficulty in obtaining a clear title. Therefore, when the debt for which

In re Benjamin H. Hatcher.

the property is bound as security is due, the interest of creditors will, I suppose, generally be promoted by a sale of the whole property. This may be effected by sale made by the assignee and mortgagee jointly or in pursuance to the judgment of some court of competent jurisdiction. When the amount of the debt claimed by the creditor is not admitted by the assignee, and cannot be agreed between them, of course the assignee should resort to the proper court to ascertain it, and for a sale at the same time.

In all cases the assignee will consider the interest of creditors, and should sell property subject to the incumbrance upon it, or seek to have it sold free from incumbrance, accordingly as he thinks the interest of the creditors of the bankrupt will be promoted by the one or the other mode of sale.

The clerk will send a copy of this opinion to the assignee.

U. S. DISTRICT COURT, KENTUCKY.

Where a petitioner in bankruptcy fails to attend before the register on the day fixed in the order of reference, he may, nevertheless, be adjudicated a bankrupt within a reasonable time thereafter.

If he does not appear within a reasonable time, upon the fact being reported to the court by the register, the petition may be dismissed.

In re BENJAMIN H. HATCHER.

BALLARD, J. The register certifies that the petitioner failed to attend before him on the day fixed in the order of reference, and that he has not since appeared, and that consequently he declined to make adjudication. He asks whether or not he has "power to appoint another day for the bankrupt's attendance, that is, enter upon his memorandum that he sat at the time and place designated in the order of reference, and adjourned to some future day to allow the bankrupt to report, or should a new order of reference be obtained?"

I see no necessity for any new order of reference. The

In re Stephen B. Leachman.

case has already been referred, and General Order No. 4 provides that when it is referred to a register "thereafter all the proceedings required by the act shall be had before him, except," &c.

True, the order of reference, Form No. 4, designates a day on or before which the petitioner shall attend before the register, and Rule 2 of this court authorizes the register to fix the times when he will act upon the several matters arising in the case referred to him, other than the attendance of the bankrupt as fixed by order Form No. 4; but I think neither the order, nor the rule, prevents the register from making adjudication and taking other proceedings when the bankrupt does appear within a reasonable time after the day fixed and asks for the appropriate orders. The petitioner should, of course, explain in a written affidavit why he did not attend as required by the order of reference, because if he wilfully disobey this, or any other, order he may not be allowed his discharge; but an adjudication of bankruptcy can be none the less valid because it is entered on a day subsequent to the time fixed in the order of reference. If the bankrupt does not appear within a reasonable time, upon the fact being reported by the register to the district court, the petition may be dismissed.

U. S. DISTRICT COURT, KENTUCKY.

A bankrupt on examination may be cross-examined by his own counsel.

In re STEPHEN B. LEACHMAN.

BALLARD, J. In this case the bankrupt had submitted to an examination before the register by a creditor. The counsel of the bankrupt claimed the right to cross-examine him, and was proceeding to do so, when the counsel for the creditor objected, insisting that the bankrupt cannot examine himself, and that he may only "correct any statement made

In re Stephen B. Leachman.

during the course of his examination" in the manner prescribed in General Order No. 34. The register has certified the question thus raised for decision here.

I have already decided, in the *Matter of John W. Dean*, bankrupt (N. B. R. *quarto*, vol. 1, p. 26), that the "examination" of the bankrupt is a "deposition" within the meaning of the bankrupt act. Section 26 prescribes how his attendance before the register may be procured; the matters in respect to which he may be examined; that the examination shall be in writing, and how it shall be disposed of. It then provides that in a like manner the attendance of any other person as a witness may be required. Form No. 46 is the caption of the examination, whether of the bankrupt or of the witness. General Order No. 10 provides how the examination of witnesses is to be conducted; and if it does not prescribe the mode of conducting the examination of the bankrupt, there is no rule or order relating to the subject. In my opinion the bankrupt, when examined, is a witness, so far at least as the mode of conducting his examination and cross-examination are to be conducted as provided in General Order No. 10. It certainly would be very hard and unreasonable to require a bankrupt to answer only the questions of a creditor or assignee, and deny him the opportunity of offering as a part of his examination any explanation which he may have to make; and as he cannot be denied the benefit of counsel, I do not see how such explanation could be more appropriately made than in answer to questions propounded by his counsel.

Whether the bankrupt when examined is for all legal purposes the witness of the assignee or creditor, or whether his cross-examination is to be conducted precisely as that of other witnesses, are questions not presented by the certificate, and cannot be decided.

The clerk will certify this opinion to the register.

In re J. W. Wright.

U. S. DISTRICT COURT, KENTUCKY.

A question, in order to be properly certified to the judge, must arise regularly in the course of proceedings before the register, and between the parties having the legal right to raise it.

In re J. W. WRIGHT.

BALLARD, J. I do not see how the "point or matter" certified in this case under date of January 29, 1868, could have arisen "during the proceedings before the register," or "in the course of such proceedings, or upon the result of such proceedings."

If the assignee should move the court for an order requiring the bankrupt to surrender to him the yoke of cattle owned by the bankrupt at the adjudication in bankruptcy, or if the assignee should sue the bankrupt for the cattle, then it is possible the question of title might arise before the register sitting in chambers to dispose of "uncontested matters" under the 4th section of the bankrupt act and Rule 28 of this court, which it might be his duty to cause "to be stated by the opposing parties in writing," and to "adjourn the same into court for decision by the judge." But it does not appear that any such motion has been made, or that any such suit has been brought, or that the assignee is even a party to or is cognizant of this proceeding. If any one is entitled to the possession of the yoke of cattle in question against the bankrupt it is the assignee, and not the creditor. The question of title can be decided only in some direct proceeding between the assignee and the other party claiming.

I have already suggested two modes by which the question certified might properly have arisen. Section 6 of the act prescribes another, and doubtless there are still other modes.

Section 6 provides that, "in any bankruptcy, or in any other proceedings within the jurisdiction of the court under this act, the parties concerned or submitting to such jurisdic-

In re J. W. Wright.

tion may at any stage of the proceedings, by consent, state any question or questions in a special case for the opinion of the court," &c. The provision contemplates a submission to the court of any question by a proceeding in the nature of an agreed case. The mode of proceeding in such a case is well understood by all lawyers, and need not be here stated.

I wish to state, once for all, that it is not every question made by parties in the presence of a register that
92 * is to be certified by him for decision by the judge.

It must be a question arising properly in the course of the proceedings before him, — that is, it must arise regularly in the course of the proceedings before him, and between parties who have the legal right to raise it, — otherwise, the judge might be called on to decide innumerable abstract questions, when his decision would, of course, conclude nothing and bind no one.

I decline to decide the question certified in this case, because it was not made by parties having the right to make it, and because it does not seem to have arisen in any proceeding before the register.

I do not wish to be understood as saying that creditors of a bankrupt cannot, under any circumstances, nor in any way, raise such a question as is here certified. Possibly, upon their suggestion that the assignee was acting in bad faith and refused to raise such question, or upon some similar suggestion, they might be heard. But there is no such suggestion here. -

In re Heman P. Harden.

* U. S. DISTRICT COURT, MAINE.

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A debt barred by the statute of limitations of Maine, where the bankrupt resides, cannot be proved against his estate in bankruptcy by a creditor resident in another state, notwithstanding such demand is not barred by the statute of limitations in the state where the creditor resides.

Such debt is not revived by its entry on the schedule of liabilities of the bankrupt.

In re HEMAN P. HARDEN.

FOX, J. Register Thatcher has, in this case, certified two questions for decision. *First.* Whether debts due citizens of Massachusetts and Rhode Island, who have always resided in those states, are provable against the estates of the bankrupt, who has always resided in this state, such debts being barred by the statute of limitations of this state? *Secondly.* If the same are so barred, are they revived by their being entered by the bankrupt on his schedule of liabilities annexed to his petition in bankruptcy?

The first question has been carefully examined by two of the most learned judges of the United States district courts, and they do not agree in their conclusions. Blatchford, J., in an elaborate opinion, in *Case of James T. Ray*, to be found in N. B. R. vol. 1, p. xlv., holds that such demands are provable notwithstanding in an action at law they would otherwise be barred by the statute of limitations. Lowell, J., in an able opinion reported in N. B. R. vol. 1, p. 66, *quarto*, decides that such claims are not provable against the estate of the bankrupt.

I have carefully examined these opinions, and concurring in that of Judge Lowell, I do not feel it incumbent on me to do much more than to refer to his opinion for the reasons which lead me to this conclusion.

It seems to me, beyond all question, that if these claims were allowed by the register and district judge, and an appeal taken under the 24th section of the bankrupt act, that on trial, before the circuit court of Maine, the plaintiffs must

In re Heman P. Harden.

fail to recover. This section expressly declares "that on such appeal the creditor shall set forth his claim in a statement substantially, as in a declaration, for the same cause of action at law, and the assignee shall plead or answer thereto, in like manner, and like proceedings shall be had in the pleadings, trial, and determination of the cause, as in an action at law, commenced and prosecuted in the usual manner, in the courts of the United States. Could not the assignee plead in such a cause the statute of limitations of Maine, and would it not be a valid defence? This language, most certainly, expressly authorizes such a plea, if it may not be said to require it. It is "the assignee shall plead in like manner and like proceedings be had in the pleadings and trial, as in an action at law, in the courts of the United States." The United States courts in Maine, in an action against a resident of Maine, must be governed by the laws of Maine, regulating the limitation of actions, if properly pleaded, and they can administer none other in such a cause. "As to statutes of limitations the *lex fori* must control." 8 Peters, 372.

Judge Blatchford admits, in his opinion, that no debt can be considered "due and payable," which is barred by the statute of limitations, and that a debt so barred, cannot be proved. If an action were pending before him, in the circuit court of New York, with a plea by the assignee of the statute of limitations, it certainly seems to me that the judge would be bound to recognize the validity and effect of this plea. There is certainly not a word which I can find in the whole of the bankrupt act, which would authorize him to reject it as an improper plea not allowable under the provisions of the bankrupt law, or which would restrain and deprive the plea of its usual and customary effect; but on the contrary, as I apprehend, the 24th section as above quoted would require of the court to proceed in the pleadings, trial, and determination of the cause, as in an action at law.

The provisions of the 22d section, requiring of the court to reject all claims not duly proved, or when the proof shows the claim to be founded in fraud, *illegality*, or mistake, in my

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opinion, tend to corroborate this construction and sustain the view that only legal claims, such as could be sustained against the bankrupt in a proceeding at law, are provable. Would the claims of these creditors be a sufficient basis for involuntary proceedings against the debtor under the 39th section? By this section, a debtor guilty of certain fraudulent acts may be adjudged a bankrupt on the petition of one or more of his creditors, the *aggregate of whose debts, provable under this act*, amounts to at least \$250. Will it be claimed that debts to the amount of \$250, upon which no recovery could be had in the circuit court of Maine, by reason of their being barred by the statute of limitations of Maine, would be such an indebtedment as against his will could be a foundation for proceeding against a debtor under the 39th section, to force him into bankruptcy? I can find no provision of the act which would prevent such a debtor from replying that he did not owe the demand, that the debt was not a legal, valid claim against him, and could not be sustained against, on any proceedings for its recovery; in fact, he might say it was paid, and from the lapse of time the presumption of law arises to sustain this averment.

Would not a debtor, owing demands which could be enforced against him, contracted within six years, and also other demands contracted personally and barred by statute, have a right, under the bankrupt act, to pay or secure all of the former, to the entire exclusion of the latter, and would such conduct on his part constitute an act of bankruptcy, subjecting him to the provisions of the involuntary clause in behalf of the holders of these outlawed demands? Would such a preference be set aside, and the transfer adjudged invalid, and the holders of these old debts allowed to share and divide among themselves, all the property so conveyed in preference, or in payment of legal and valid claims, to the entire exclusion of the holders of these demands, and would such a preference and payment, of every dollar which could be recovered against him, deprive him of his discharge, if he should be driven into bankruptcy by the holders of the claims

In re Heman P. Harden.

barred by the statute? Such consequences would seem to result, if the language of the 39th section, "debts provable against him," would include demands barred by the statute, and if the holders of such demands are to be recognized as creditors entitled to avail themselves of the benefit of this section.

The language of the act, to authorize such a construction and thereby subject a debtor to proceedings in bankruptcy against him, founded on claims to which he had a complete and perfect defence at law, should be so positive and certain as to admit of but one construction, and I can find nothing in this act which compels me to so interpret it. It is conceded that such has been the law in England ever since the decision of Lord Eldon in *15 Vesey*, holding that demands barred by the statute of limitations are not provable, and no good reason, as I think, exists for a different construction of the act of congress. The principal argument against such a construction is drawn from those provisions of the act relating to the bankrupt's discharge; it is claimed that under this view of the law the debtor cannot obtain his discharge from demands so barred, as only "provable debts" are discharged. I have no doubt that, for the purposes of the discharge, these demands are to be considered as provable debts, and that if the bankrupt obtains his discharge he will be protected against them, that his discharge will operate against them. Such demands are of a provable character, but are no longer "due and payable," within the meaning of the act, because the law of the forum, designated by congress for the adjudication of the matter, presumes they are paid, and a paid demand no longer exists as a provable legal cause of action against the debtor. The reasoning of Judge Lowell on this point is entirely satisfactory to me, and affords a complete answer to the objection that the debtor would not be relieved from these claims by his discharge.

The entry of these claims by the bankrupt on his schedule of liabilities cannot be considered as a waiver

* of the statute, or a new promise to take them out 98

In re Heman P. Harden.

of the statute. A naked acknowledgment of a debt, is, of course, not a new promise, but is only evidence from which the court or jury may infer a new promise on the part of the debtor, and to authorize such an inference, to use the language of Mr. Justice Story in *Bell v. Morrison*, 1 Peters, 362, "if there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay, we think they ought not to go to the jury as evidence of a new promise to revive the cause of action." An intention to pay his liabilities is certainly the farthest thing possible to be inferred from a debtor's filing a petition in bankruptcy to be discharged therefrom. On the contrary, he thereby says he cannot pay and does not intend to pay, or to have them remain as outstanding demands against him; instead of paying, he means and intends forever to be discharged therefrom.

I understand that Judge Lowell and Judge Blatchford both agree in this result, and are of opinion that the demands are not taken out of the statute by being thus entered by the bankrupt in his schedules of liabilities.

The demands of these creditors are not provable against the estate of the bankrupt, and it will be so certified to the register.

March 16, 1868.

In re Robert Ratcliffe.

U. S. DISTRICT COURT, PENNSYLVANIA.

Material additions to the schedules of debts, or of property, are not allowable, by way of admendment, after the first meeting of creditors, except upon such conditions as may prevent injustice. In some cases the issuing of an alias warrant will be required.

In re ROBERT RATCLIFFE.

CADWALADER, J. The bankrupt's counsel presents a proposed amendment, the purpose of which is to introduce, by addition, the names, &c., of six judgment creditors omitted in the list appended to the petition, according to which list the warrant was framed, and the notices of the first meeting of creditors given. Such an amendment would have been allowable, as of course, before warrant issued. But after it has been issued, at all events after final adjournment of the first meeting, such an amendment cannot be allowed except upon conditions requiring in effect a recommencement of the preparatory proceedings. Under the equity, if not under the enactments, of the 12th section of the act of congress, these conditions may perhaps be imposed and fulfilled. But the register having charge of the case can much better suggest them, than the court, without immediate access to the papers in the register's office, prescribe them. The register will, therefore, in this case, report specially to the court the conditions upon which, in his opinion, the amendment may be allowed. The subject is of great practical importance, and will, after his report, receive from the court due consideration.

November 2, 1867.

REPORT OF REGISTER HOBART.

In this case the bankrupt, after the issuing of the warrant, publication made, notice served on all the creditors named therein to prove their debts at the first meeting and choose an assignee, and said first meeting having been held, proof of

In re Robert Ratcliffe.

debts made by creditors, and an assignee appointed, applies to the court for leave to amend his petition and schedules by adding thereto the names of six judgment creditors, which were omitted in the petition as filed.

The act of congress requires the petitioner to annex to his petition a schedule, verified by oath, containing a full and true statement of all his debts, and, as far as possible, to whom due, with the residence of each creditor, &c. And by the 12th section, if it appears that the notice to the creditors has not been given as required by the warrant, the meeting shall forthwith be adjourned and a new notice given. The warrant is filled up from the list of creditors annexed to the petition, and the notices served on the creditors named therein.

Each creditor is entitled to know who are the other creditors of the bankrupt, and to meet them before the register on the day designated in the warrant and notice, and has also the right to object to the proof of any claim which may be deemed to be improperly included in the schedule: and ought not, through the omission, inadvertence, or neglect of the bankrupt, to be deprived of that right.

If a precedent were established, allowing amendments, of course, after the first meeting of creditors has been held, and proof of the debts of the omitted creditors taken, without a new notice to all the creditors, a door might be opened for fraud and collusion between the bankrupt and certain of his creditors, whose claims might be disputed by the others, and dividends on which might be secured out of his estate by that omission and amendment.

The register is therefore of opinion that the conditions to be imposed upon the allowance of the proposed amendments, should be the issuing of a new warrant, embracing as well the names of the creditors already notified as of those named in the amendment, notifying them to meet before the register on a day to be named therein, and prove their debts, &c. This would give each creditor notice of all the claims against the estate of the bankrupt, and an opportunity to object to

In re John Morganthal.

the proof of any debt which might be deemed to be improperly included in the schedule. The proof of debts already made to remain, as well as the appointment of the assignee, unless the greater part in number and amount of the creditors whose debts have been proved and entitled to vote at such meeting, should choose another. Although the bankrupt would be subjected to some additional expense by the imposition of these conditions, yet it may in almost every case be avoided by the exercise of due care in preparing the petition and schedule. Respectfully submitted,

JOHN P. HOBART, *Register.*

CADWALADER, J. The register's report is conformable to the views expressed in my order of 2d instant. He will not, therefore, allow the amendments except upon the condition which he suggests.

November 23, 1867.

U. S. DISTRICT COURT, PENNSYLVANIA.

A bankrupt cannot amend his schedules, by adding other names to the list of creditors, as of course, after the warrant, and after the close of the business of the first meeting.

The register may report provisionally as to the conditions on which the amendments should be allowed.

In re JOHN MORGANTHAL.

CADWALADER J. The petition of this bankrupt returns, of unsecured debts, in schedule A 3, eleven items for, together, about six hundred dollars. He now applies to amend by adding to the list twenty other debts, for amounts together exceeding that sum in a small amount. He proposes, at the same time, to add, by way of amendment, six items of outstanding credits, not in the original schedules of his estate, to the amount of, together, \$314.25, which is not a small proportional addition to the property at first disclosed.

The register seems to be of opinion that amendments of

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this kind should be allowed, as of course, after the warrant, and after the close of the business of the first meeting. This would be a very dangerous practice, where such culpable laxity is indicated as this case exhibits. The clerk will send to him a copy of the register's and court's opinions, in the *Case of Ratcliffe* (2d and 23d November, 1867, *ante*, p. 400.) The amendments asked for in the present case cannot be allowed, except upon such conditions as may prevent injustice to creditors. What those conditions ought to be may be reported provisionally by the register. There certainly must be a new list of creditors made out and sent to every known creditor, with a notice of the amendment of the schedule of property. Whether a new warrant will be necessary, depends upon the question, whether a new general notice by publication will be requirable. On this point the register's report will furnish the materials for a decision.

COURT OF COMMON PLEAS FOR BALTIMORE CITY.

An attachment was issued out of a state court on the 11th of April, 1867. On a motion to quash the attachment, the court held that the conditional lien acquired by the levy of an attachment, may be divested by the operation of a general bankrupt law, and that to this extent the act became a law in March, 1867.

Demurrer to motion overruled.

WILLIAM H. CORNER v. E. G. MILLER & W. S. MOORE,
garnishees of JOHN S. MOODY; CHARLES R. MALLORY,
assignee in bankruptcy, claimant.

GAREY, J. This is a proceeding by attachment on warrant issued out of the late court of common pleas, on the 11th of April, 1867, against the goods, chattels, and credits of a certain John S. Moody, a resident of the State of Virginia. The attachment was laid in the hands of a number of garnishees, who have appeared and pleaded *nulla bona*. On the 18th of February, 1868, Charles K. Mallory appears

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as claimant of the property and credits attached, and moves to quash the attachment for the reasons following, namely: That the defendant, Moody, on the 24th day of July, 1867, upon proceedings instituted on the 2d day of the same month, was duly declared a bankrupt under the act of congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867; and that the claimant afterwards became the assignee of the bankrupt; and that, as such, he had received from the register in bankruptcy an assignment of all the estate, real and personal, of the said bankrupt, by virtue of said instrument, all the property, estate, and credits of the said Moody invested in him, as such assignee; and that the attachment should be dissolved, and the property and credits in the hands of the garnishee ought to be adjudged and delivered to him. To the petition and motion the plaintiff demurred; and the question for determination is, whether the facts set forth by the claimant, and *admitted by the plaintiff to be true*, are sufficient to dissolve the attachment. The claimant relies upon the 14th section of the bankrupt law, "That as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all its deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon by law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached *on mesne process*, as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings."

It is not denied that the attachment in this case is *mesne process*, and that, by a literal construction of the act, the property and credits in the hands of the garnishee, although attached as the property of the defendant Moody, vest in his

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assignee; and that, as the writ was issued and laid in the hands of the garnishee *within four months next preceding the commencement of the proceedings against the bankrupt*, that his assignee, who had received a conveyance of all his property and estate, is entitled to the funds and property in the hands of the garnishees, and the attachment should be dissolved.

* But it was contended for the plaintiff that the act 99 did not apply to this case because, although approved on the 2d of March, 1867, it did not go into effect until the 1st day of June ensuing. This view was based on the 50th section, which declares "that this act shall commence and take effect, as to the appointment of the officers created hereby and the promulgation of rules and general orders, from and after the date of its approval; provided, that no petition or other proceeding under this act shall be filed, received, or commenced before the 1st day of June, 1867." And it was further contended, that whereas the attachment was issued on the 11th of April, 1867, before the act went into operation, to apply it to this case would give to it a retrospective effect so as to deprive a party of a *vested right* — a construction never adopted by the courts, either in England or the United States, unless the words of the statute be clear and unambiguous and incapable of a different construction. English Com. Law, 551; 7 John. R. 503. Certainly the words of this section are clear and unambiguous; they read thus: "*Shall dissolve any such attachment made within four months next preceding the commencement of said proceedings.*" No language can be clearer, and there seems to be but one construction of which it is susceptible. But it is not admitted that the act did not take effect except "as to the appointment of the officers created thereby and the promulgation of rules and general orders" until the 1st day of June, 1868; but, to the contrary, it will be found that the most important rights and liabilities devolved upon parties immediately after the passage of the act; [see sections 23, 27, 29, 39, and 44] — for the right to compel a debtor into involuntary bankruptcy —

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the disallowance of preferences, or of a discharge to a bankrupt, and the right to have him punished for a fraud upon his creditors. All these disabilities accrue as well before the 1st day of June as afterwards, and are the vital points and matter of the law. I therefore conclude that the act became a law in March, and that, by the 50th section, there was only a suspension of the remedies, that is of petitions, or other proceedings under the act, so that "they should not be filed, received, or commenced" before the first day of June afterwards, when the law should go into full operation; that is to say, should furnish all the remedial and other processes for the execution of its provisions. If these premises be correct, the plaintiff's first argument cannot prevail against the claim of the assignee. But this is not conclusive of the case, if the plaintiff has established his further allegation that, even if the law is explicit to give the right claimed by the assignee, the lien of the attachment was a *vested right*, and congress had no right to defeat or take it away. It would be difficult to imagine a more interesting question than this, affecting, as it does, the interests of so large a class of our citizens, and requiring an examination into the powers of congress, under the Constitution of the United States, to divest rights that have attached among the citizens of the several states. The right to pass a bankrupt law is contained in article 1, section 8, of the Constitution, which declares that congress shall have power to establish "uniform laws on the subject of bankruptcies throughout the United States." In the exercise of this power congress enacted a general bankrupt law in April, 1800, and in August, 1841, and again the present act of 1867. Previous to the adoption of the Constitution, the states severally possessed the exclusive power to pass such laws, and they conferred, by that instrument, the power upon the general government. In so doing, they limited the right which they before had over contracts, and accepted the provision in the Constitution, article 1, section 10, that no state shall pass any "law impairing the obligations of contracts;" under this restriction, they retain a right to pass bankrupt or

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insolvent laws, as the grant to congress is not exclusive, unless the power be exercised by a state so as to impede, or conflict, with a bankrupt law of the United States. Thus, the insolvent law of Maryland seems to have been suspended, and superseded, in its operations, by the act of 1867, except in cases where the debts of the applicant, provable under that act, shall not exceed the sum of \$300.

On the subject of the relative powers of the states, and of congress, to discharge the debts of a bankrupt, Mr. Justice Woodbury says: "Where future acquisitions are attempted to be exonerated, and the discharge extended to the debt or contract itself, if done by the states, it must not, as here, apply to past contracts, or it is held to impair their obligation. Congress alone can do this, as to prior contracts, by means of an express permission in the Constitution to pass uniform laws on the subject of bankruptcy; and which laws, when not restrained by any constitution, or clause like this, as to states impairing contracts, may, in that way, be made to reach past obligations." *Planters' Bank v. Sharp*, 6 Howard, and cases there cited; 5 Gill, 442.

The bankrupt act of 1800, section 63, provided, "that nothing contained in this act shall be taken or construed to invalidate or impair any lien existing at the date of this act upon the lands or chattels of any person who may become a bankrupt." Here, by clear implication, a lien might be invalidated, or impaired, that attached after the passage of the act and before the bankruptcy. That such was the meaning of the law appears in *Harrison v. Sterry*, 5 Cranch, 298, which was the case of an attaching creditor and others against an assignee under that act. Chief Justice Marshall says, as to the attaching creditors, "by the bankrupt law of the United States their priority, as to the funds of the bankrupt, is lost. They can only claim a dividend with the other creditors. So far, then, as the effects attached are the effects of the bankrupt, their *lien is removed by the bankruptcy*."

The act of 1841, section 2, after setting forth what acts of the bankrupt shall be a fraud upon the act, and void, contains

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a proviso "that nothing in this act shall be construed to annul, destroy, or impair any liens, mortgages, or other securities or property, real or personal, which may be valid by the laws of the states, respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." Here, whatever was a valid lien or mortgage or security by the laws of the several states, was excepted by the express language of the act. The supreme court, under this provision, considered that an attachment on *mesne process* in New Hampshire created a charge on the property attached in favor of the plaintiff, which, in the language of the statutes and courts of that state, was called a security and a *lien*. They proceed to quote the fourth section of the act, that "the certificate or discharge, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act, and shall or may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever;" and then say, "it is contended, as the lien of the attachment was defeasible, and could only be rendered absolute and of practical benefit to the plaintiff by the recovery of a judgment for his demand, which is effectually barred by the plea, that therefore the action and the lien must fall together." "This conclusion would be undoubtedly correct if we construe this section of the act by itself, and without regard to other provisions of the same act." The other provision alluded to is the second section before cited, saving all liens, securities, &c., so that the court decides that without such a reservation, the plea would be good and the attachment would fail, and if so, then under our practice a motion to quash based on the same reasons would have prevailed. By Justice Grier, *Peck v. Jenness*, 7 Howard, 618.

Now the act of 1867 has no such exception or saving clause, and must therefore be construed under this decision as a bar to an attachment on *mesne process*; even if it did not contain the clause relied on in this case *à fortiori*, how could the court

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decide otherwise upon the plain and express language of the provision now, for the first time, inserted in a bankrupt law of the United States? But it does not seem at all necessary to assume the right in congress, by means of a bankrupt law, to impair the obligation of contracts in this case. No doubt can exist that the United States, or any one of the states, can pass laws to alter or take away the remedy for the enforcement of a contract, although such remedy be a vested right, it being only necessary that a remedy should be given, though not in fact so good as the one taken away. *Brown v. Kinzie*, 1 Howard, 316.

Under our insolvent laws, act of 1805, chapter 110, section 5, *fieri facias* must have been *actually and bonâ fide levied* before the application of the insolvent to create a lien upon the property in the hands of the trustee, while by the law of the state, never once claimed to have been repealed by this statute, *fieri facias* was a lien upon personal property so soon as it came to the hands of the sheriff or other officer. 5 Gill, 178; 6 Harr. & John. 264, 455; 7 *Ib.* 460.

Here, then, a lien arising out of final process was divested, and no pretence was set up of its being at variance with the Constitution of the state or of the United States, by the eminent counsel engaged in the case of *Alexander v. Ghiselin*.

Chancellor Bland says that the acts of assembly, in relation to attachments against non-residents in this state, "were always considered as laws regulating process for the more effectual recovery of debts, or as providing a special auxiliary remedy for the recovery of debts. See 3 Bland, 119, and cases cited.

Although afterwards there was a departure from the theory of our attachment laws, yet the change did not create a lien other or greater than that subsisting under former laws, but simply *continued to the creditor* "the lien which, by the settlement of the attachment, he had on the property attached. 3 Gill, 325. No doubt the general assembly could have taken away the attachment process and the lien dependent upon it, but it chose rather to extend it. In either case they

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had full power over it, and if, by a repeal of its provisions, vested rights, or what are called liens, existing by the levy of *mesne process*, had been destroyed, it could not be complained that the law had "impaired the obligation of a contract," but that it had only altered the nature of the remedy.

It follows, then, very clearly, that the conditional lien acquired by the levy of an attachment or of its being laid in the hands of a garnishee, may be divested by the operation of a general bankrupt or a local insolvent law, if the language of the act be sufficiently clear to indicate that purpose.

Such being the conclusion of the court, an order will be signed overruling the demurrer to the motion, and for such further determination of the matter as may be necessary in conformity with the foregoing opinion.

• U. S. DISTRICT COURT, W. D. PENNSYLVANIA. 105

When the petitioning creditor, the bankrupt, and all the creditors who have proved their debts, desire the court to dismiss the proceedings before the choice of an assignee, an order will be made by the court directing that the proceedings be dismissed, and allowing the messenger to deliver up to the bankrupt the property seized, upon the payment of costs.

In re WILLIAM D. MILLER.

THIS being the day to which the first meeting of creditors was adjourned, at the request of said creditors, and also the day fixed for hearing the creditors, upon their petition praying for the discontinuance of the proceedings in this matter, which said petition was referred to me by special order of said district court, "with power to investigate the facts and to report upon the *law* and expediency of such discontinuance. And further, that said register call a meeting of the creditors," &c. And further, that said register report as soon as may be thereafter the action of said meeting to this court, and *as to the power of the court* to order such discontinuance. I sat, at the time and place above mentioned, for the purpose of performing the duties so assigned to me.

In re William D. Miller.

All the creditors of said bankrupt named in the schedule was notified of the time and place of this meeting, under the order of the court, by publication in the Erie Daily Republican, copies of which, containing the notice, were sent to each of the creditors, as well as to those who had proved their debts.

Nineteen out of fifty-four of the creditors have proved their debts, amounting in all to the sum of \$9,030.95. All of these were present at this meeting, or duly represented by their attorneys, except the "Akron Stove Company," whose claim, as proved, is only twenty-five dollars. All the remaining twelve who have proved their debts, amounting to \$9,005.95, vote in favor of dismissing the proceedings in bankruptcy, in compliance with the prayer of the petition. The claims of the creditors who have not proved their debts amount to about twenty thousand dollars.

In view of the facts that the petitioning creditor, D. J. Crowell, the bankrupt, and all the creditors who have proved their debts (with the single exception above mentioned), desire the court to dismiss the proceedings, the register is of the opinion that it is expedient and proper that it should be done, provided it is lawful to do so. On this point the following is respectfully submitted to the honorable judge of the district court :

OPINION OF THE REGISTER.

William D. Miller was duly adjudged a bankrupt on the 18th day of October, 1867, on petition of D. J. Crowell, one of his creditors. Twenty-four of his creditors petition the court to dismiss and supersede the whole proceedings. No assignee has yet been chosen. The bankrupt and the petitioning creditor, and all the other creditors who have proved their debts (save one who did not appear nor make any opposition, and whose debt only amounts to twenty-five dollars), join in asking the court to grant the prayer of the petition.

Has the judge of the district court the power to do so?

In re William D. Miller.

Two learned attorneys appeared before the register, in support of the affirmative of this proposition, but they furnish no authority or law bearing on the point, and base their arguments upon the general power of common law courts to dismiss proceedings upon the application of the parties.

The proceedings in bankruptcy are *sui generis*, and in absence of any express enactment, it is proper to look to the general scope and spirit of the act of congress creating the jurisdiction. I am not aware that the question under consideration has been determined or even discussed in proceedings under the act of March 2, 1867.

In coming to the conclusion I have arrived at, I give much weight to the action of the creditors who have proved their debts, at the meeting above referred to. At that meeting they decided that, in their opinion, it was best for all concerned that the proceedings should be discontinued — *nemo contradicente*.

The act gives large powers in the premises to these meetings of creditors. When presided over by the register it calls them "courts of bankruptcy." Sections 11, 12. It authorizes a majority in number and value of such creditors to elect assignees (section 13), to remove an assignee by a similar vote (section 18), to determine the amount of dividends (section 27). Three fourths in value of them may supersede the proceedings by arrangement, and commit the whole estate of the bankrupt to trustees, who shall settle the estate under their direction (section 43), in which event the whole matter is taken out of the hands of the court, except as its aid is invoked by the creditors.

The creditors who do not prove their debts are not allowed to have a voice in any of the proceedings, or to participate in the funds.

The policy of the act is to have the estate disposed of in such manner as the proving creditors shall determine is for their interest. In the present case they have determined that their interests * will be best promoted by allowing the bankrupt to resume the possession of his

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estate, and to continue business. The register is of the opinion that the court has power to grant their request. There are some decisions under the bankrupt laws that have a bearing upon this point. In Cullen's Bankrupt Laws, 440, it is said, "The only case in which any express provision by statute has been made for superseding a commission is that of a petitioning creditor compounding his debts with the bankrupt; but the lord chancellor has always exercised a discretion of this kind whenever the ends of justice required, either for the sake of the creditors or of the bankrupt himself, that a commission should not be suffered to proceed."

Hilliard on Bankruptcy, 2d edition, 406, "A district judge derives the power to supersede a commission of bankruptcy from the bankrupt law, by construction and implication." *Morris's Estate*, Crabbe, 70, cited Hilliard on Bankruptcy, 407. "A *supersedeas* lawfully ordered places the bankrupt and his estate in the same situation they would have been in if the commission had never existed." *Ib.* 407.

For the foregoing reasons the register is of the opinion that it is both expedient, and legal, that a decree be entered by the court, directing the whole proceedings in this matter to be dismissed, vacated, and annulled; and that the marshal, as messenger, be directed to render up to the said William D. Miller, all property in his possession by virtue of the warrant of seizure, upon the payment by the said William D. Miller, of all costs of the proceedings.

SAMUEL E. WOODRUFF,
Register in Bankruptcy.

MCCANDLESS, J. The decision of the register is affirmed.
January 28, 1868.

In re Van Buren Cobb.

U. S. DISTRICT COURT, INDIANA.

Section 14 of the bankrupt act must be so construed that over and above the necessary household and kitchen furniture, the assignee may, in his discretion, exempt, in favor of the bankrupt, "such other articles and necessities" as he may think right, so that such exemption, together with the household and kitchen furniture allowed to be retained by him, shall not exceed \$500.

The fact that the wife may have, as her separate property, household and kitchen furniture in use in the house in which the bankrupt resides, can make no difference as to the amount of exempt property to be allowed him.

The bankrupt is also entitled to retain \$300 worth of real or personal property as the exemption allowed by the state where he resides.

The assignee must select the property to be exempt under the bankrupt law, and should refuse to set apart mere articles of luxury, as gold watches or pianos, &c.

The bankrupt may select the property exempt under the state law, and it is for him to choose or reject articles of mere luxury.

In re VAN BUREN COBB.

IN the course of proceedings in this case, the question arose upon the setting apart, by the assignee, property under the exemption clause of the bankrupt law, and came before the judge for his decision.

MCDONALD, J. In June last, Van Buren Cobb, of Morgan County, Indiana, was declared a bankrupt by this court. The matter was then referred to the proper register; and subsequently, at a meeting of his creditors, William. B. Taylor was appointed his assignee.

Under the 14th section of the bankrupt act, the assignee set apart to Cobb certain property as being exempted from the provisions of that act. Cobb had other property which he claimed as being also exempted; but the assignee disallowed his claim. To this ruling of the assignee the bankrupt excepted, and the exception thus taken is now before this court for decision.

The ruling of the assignee was substantially as follows:

"I allow you to retain, as exempt from the provisions of the 14th section of the act, and also in connection therewith, and under and by virtue of an act of the legislature of the

In re Van Buren Cobb.

State of Indiana, to exempt property from sale in certain cases, the sum of \$300."

"I allow you the necessary provision on hand, amounting to \$51.50, as shown by the appraisement."

"I refuse to allow you to retain any more property of any description whatever, for the following reasons, to wit: (1.) Because your wife is owner in fee of 80 acres of land in this (Morgan) county, of the value of \$1,000. Also, she is the owner of a house and lot — your residence — in Martinsville, in said county, of the value of \$2,000. Also, she is the owner of parlor furniture in your house of the value of \$123; one bed and bedding, \$40; one set of queen's ware, \$7; one old bureau, table, &c. \$10; to which add value of real estate, \$1,000. Total, \$3,180. (2.) Because, in my opinion, your condition, under these circumstances, is much better than that of a number of your creditors."

By the record it appears that the \$300 allowed by the assignee to Cobb, was allowed under the state law, and consisted of a title bond for the conveyance of certain real estate.

The record also shows that all the other property of the bankrupt turned over to the assignees was of the value of \$267, including household and kitchen furniture appraised at \$175.

The record also shows that the bankrupt is a householder in this state; and that his family consists of a wife and three small children.

Whether, under these circumstances, and on a fair construction of the 14th section of the bankrupt act, the decision of the assignee was right, is the question before the court.

The provisions of the section in question, so far as they touch the points under consideration, are as follows:

"That there shall be exempted from the operation of the provisions of this section, the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of \$500; and also the wearing

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apparel of such bankrupt, and that of his wife and children, and the uniform, arms, and equipments of any person who is or has been a soldier in the militia or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment or seizure, or levy on execution, by the laws of the United States, and such other property not included in the foregoing exemption as is exempted from levy and sale upon execution, or other process or order of any court, by the laws of the state in which the bankrupt has his domicil, at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864."

As, in almost every case of bankruptcy, question must arise on the meaning of the language above quoted, I venture to lay down the following rules for the guidance of assignees:

First. Every bankrupt, who is a householder in this state is absolutely entitled to have his necessary household and kitchen furniture exempted from the operation of the bankrupt act, to any amount not exceeding \$500.

It is true that, under this rule, the furniture so exempted must be "*necessary*" household and kitchen furniture. It cannot be necessary, in the sense of the law, unless the bankrupt is a householder — the head of a family. It is not important to this purpose that he should have a wife or children; his household may consist of a servant or servants, or any person residing with him or under his control. And, in any such case the assignee must, in the first instance, judge and decide what particular articles are "*necessary*" and what are not. The act evidently intends that every bankrupt householder shall be permitted to retain as much household kitchen furniture as may be reasonably necessary to enable him to keep house in a plain and convenient manner, provided the value of the whole shall not exceed \$500. And I suppose that, in such case, the fact that the wife may have, as her separate property, household and kitchen furniture in use in the house in which the bankrupt resides, can make no difference. By the statutes of Indiana, such sepa-

rate property does not belong to him ; he has no right to its possession or control ; and she may, at any moment, and against her husband's will, remove and dispose of it. Now it is not to be believed that the bankrupt act ever intended to make a bankrupt dependent on his wife for the necessary means of keeping house.

I think, therefore, that in this case, the assignee erred in refusing to the bankrupt his necessary household and kitchen furniture, because his wife was the owner of some real estate and of \$180 worth of household property.

But, even if the wife's household effects ought to have been considered by the assignee, still I think he erred in refusing to allow the bankrupt to retain any portion of his necessary household and kitchen furniture. The whole of it amounted only to \$175. The wife's property in the house was of little value, — parlor furniture, worth \$123 ; a bed and bedding, worth \$40 ; a set of queen's ware, worth \$7 ; an old bureau and table, worth \$10, — that is all. A court may, I think, very well take official notice that these articles did not compose all the "necessary" to enable a man to keep house with a wife and three young children. If to this the assignee had added the \$175 worth of furniture belonging to the bankrupt, it would together only have amounted to \$355 worth of household and kitchen furniture — surely little enough for the necessary furniture in the house of such a family. And if to all this we add the \$51.50, allowed by the assignee as "provision," the whole would amount to no more than \$406.50 — \$93.50 less than the act contemplates as exempt.

Second. The act must be so construed, that over and above the necessary household and kitchen furniture, the assignee may, in his discretion, exempt in favor of the bankrupt, "such other articles and necessaries" as he may think right, so that such exemption, together with the household and kitchen furniture allowed to be retained by him, shall not exceed \$500.

But, under this rule, the assignee must, in the language of the act, "have reference in the amount to the family, condi-

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tion, and circumstances of the bankrupt." In relation to "such other articles and necessities" as fall within this rule, the assignee has a discretionary power; but in no other case arising under the 14th section of the act. And even here his discretion must be a sound, legal discretion. He should look to the policy and spirit of the law; and, in my opinion, he should in no case allow the bankrupt, under the words, "such other articles and necessities," anything of mere luxury or ornament. Gold watches, pianos, and the like, for example, I think are not embraced in the discretionary powers of the assignee.

* In the case under consideration, the assignee did, 107 in the exercise of this discretionary power, permit the bankrupt to retain "provisions" of the value of \$51.50. In this he did right. And under the last rule announced, he committed no error.

Third. Every bankrupt who is a householder in this state, is absolutely entitled, over and above the exemptions already noticed, to retain, free from all claims in favor of creditors, property either personal or real, to the value of \$300.

This right arises from the provision in the 14th section of the bankrupt act, which excepts from its operation such property as by state laws may be exempted from levy and sale on execution. The act of the legislature of Indiana on this subject provides: "That an amount of property not exceeding in value \$300, owned by any resident householder, shall not be liable to sale on execution or any other final process from a court for any debt growing out of, or founded on, any contract, express or implied." 2 Gavin & Hord's Stats. 368.

Under this provision of our state law, thus made a part of the bankrupt act, every bankrupt householder is absolutely entitled to retain property to the value of \$300, and he may select any property to that amount, whether it be real or personal, and whether it be articles of mere luxury and ornament, or such as are useful and necessary to the comfortable subsistence of himself and family.

In re Jonathan J. Milner.

In this case, I do not enter into an inquiry whether this provision of the bankrupt act embodying state exemption laws is unconstitutional as not giving a "uniform law on the subject of bankruptcies throughout the United States," as required by the eighth section of the first article of the Federal Constitution. This may become a grave question for the court. But as it has not been urged in the present case, I give no opinion concerning it.

In the case at bar, it appears that under the provision of the bankrupt act adopting the state law, the assignee has set apart to the bankrupt property of the value of \$300. So far as this matter is concerned, therefore, I decide that he has committed no error.

Upon the whole, the only error committed by the assignee, is his refusal to turn over to the bankrupt his \$175 worth of household and kitchen furniture. As to this point only, his decision is reversed; and he is ordered forthwith to deliver to the bankrupt that furniture.

U. S. DISTRICT COURT, N. D. GEORGIA.

A debt incurred by the loan of Confederate treasury notes is not provable in bankruptcy.

In re JONATHAN J. MILNER.

ERSKINE, J. In 1863, John Neal loaned twenty-five hundred dollars, in "Confederate treasury notes," to Milner, the bankrupt, for which amount he made his promissory note to Neal. Subsequently, Neal, in making a disposition of his property among his children and grandchildren, gave this note to his son-in-law, Samuel Bailey, in trust for minor children of Susan Beall, a daughter of said John.

Bailey, as trustee, sought to prove this claim against the estate of the bankrupt. Counsel for the latter objected: *First*, because the consideration for the contract was Confed-

In re Jonathan J. Milner.

erate treasury notes; *secondly*, because these notes were borrowed for the purpose of hiring a substitute to serve in the Confederate army, with the knowledge of Neal, and that the notes were so appropriated, and the substitute hired therewith did go into the said army.

Evidence being heard on these points, the register rejected the claim, and the proceedings were certified to the court. The conclusion at which the register arrived was approved. *Ante*, p. 19, *quarto*.

The party whose claim was thus rejected, petitioned the judge for a rehearing, on the ground that the testimony adduced — in proof of the second objection in particular — was wholly insufficient to warrant the decision of the register, or affirmance by the court. A new hearing was granted before the register. The testimony, on both sides, is long and contradictory, with the exception that all agree that the loan was made in Confederate treasury notes. But the register adhered to the course of reasoning previously entertained by him, and gave the same judgment as before. Mr. Bailey being still dissatisfied with the ruling, the matter was again certified for review.

From the views which I entertain of the legal principles involved in this proceeding, it is not essential to an approval or disapproval of the conclusion at which the register arrived, that these Confederate treasury notes, or any portion of them, were used to procure a substitute to serve in the Confederate army, or that they were employed for any other purpose. The register holds, as he held at first, that the contract was illegal and void; and this result I approve and affirm. But I do not concur with him in one of the principal reasons advanced for his decision; and which reason is more prominently argued in his first written opinion than in his last, namely, that these notes were bills of credit within the sense of that term, as understood in the Constitution. He said: "Art. 1, section 10, clause 1, of the Constitution declares, among other things, that 'no state shall enter into any confederation' or 'emit bills of credit.' It follows, then, that

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the confederation, styled the Southern Confederacy, was entered into by the several states of which it was composed, in direct violation of an express provision of the supreme law of the land. As no state can, constitutionally, 'emit bills of credit,' it follows, as a matter of course, that no confederation of states can do so, without bidding defiance to the Constitution. The issuance of Confederate treasury notes was not only an illegal act within itself, but was doubly illegal, having been done by an illegal confederation."

"No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit," etc. Const. U. S. art. 1, sec. 10, p. 1.

No disquisition on the origin of bills of credit, or history of their rise and progress, or of their fall, under the inhibition just cited, would aid in the determination of this case. Therefore, I will but remark, that the great minds who framed the Constitution were, from recent experience, aware of the blighting effect on the domestic and foreign commerce of the states, and on the welfare of the whole country, which flowed from the almost indiscriminate issuing of these bills by the colonies and afterwards by the states, as a circulating medium, or as money among the people, to suffer its perpetuation, or to longer tolerate it to the states—and time has proven the wisdom of their statesmanship.

So far as I have been able to ascertain, all paper answering to bills of credit put forth during the war of independence, were promises to pay. But, be this so or not, the supreme court of the United States, in *Craig et al. v. The State of Mississippi*, 4 Peters, 410, held, that a paper currency emitted by a state, and receivable in discharge of all debts and taxes due the state, and of all salaries and fees of office, &c., and pledging the faith and funds of the state for the redemption of these paper issues, was within the Constitution prohibition.

The same court, in *Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Peters, 258, gave the following comprehensive definition of a bill of credit: "The definition,

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then, which does include *all* classes of bills of credit emitted by the colonies, or states, is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money."

Taking this definition as imparted by the highest judicial tribunal in the land, it will conduce to a correct conclusion of the endeavor to ascertain whether these treasury notes, or bills, issued by the so-called Confederate States, fall within it.

Although it is declared that no state shall emit bills of credit; yet if two or more of the states ally themselves or confederate together, and on their faith and credit issue these bills, I apprehend, the inhibition would apply with a force equally as direct and controlling against the allied or confederated states as against a single one.

Here is a copy of one of these treasury notes.

"Fundable in eight per cent. stock or bonds of the Confederate States. Six months after the ratification of a treaty of peace between the Confederate States and the United States, the Confederate States of America will pay five dollars to bearer. Richmond, September 2, 1861.

"Receivable in payment of all dues, except export duties."

Then follow the names of a register and treasurer.

One decision, and only one, on this subject has been brought to my notice; that is the case of *Bank of Tennessee v. Union Bank of Louisiana*, lately tried before Judge Durell, and a jury, in the circuit court of the United States, for the Eastern District of Louisiana, and published in the American Law Review for January, 1868. The judge is there reported to have said, in his charge to the jury, "that Confederate treasury notes issued by said government, and circulated as money, were bills of credit within the meaning of the Constitution; and therefore an unlawful issue." The views which present themselves to my mind do not terminate in accord with the opinion expressed by that learned and able judge.

During the years 1860 and 1861, South Carolina, Georgia, Louisiana, Virginia, and other states, by similar modes, called

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on the people to send delegates to meet in convention. Accordingly these conventions assembled, and each passed an ordinance of secession, as it is generally termed, by which ceremony these conventions severally adventured to withdraw the states from the Federal Union, and to release the people from their subjection to the laws of the land, and their allegiance to the nation. The Constitutional State governments were overthrown, and superseded by spurious and revolutionary governments. The setting up of a pretended central or general government, styled "The Confederate States of America," followed; and, soon thereafter, open rebellion and war of portentous magnitude burst upon the nation. *Vide The Prize Cases*, 2 Black, 635, and *Shortridge v. Mason*, United States circuit court, District of North Carolina, opinion of the court delivered by Chief Justice Chase. 2 Am. Law Review, 95, and 5 Internal Revenue Record, p. 206.

In the seceded states so called, the sovereign authority being for the time displaced, consequently there ceased to be, within any of them, a government under the Constitution of the United States. Then can it be said that the usurping power could pledge the faith of the state by a public law, or otherwise, for the payment of the treasury notes issued by the so-called Confederate States of America? Or could this pretended general government bind any of those states for the redemption of these notes?

But these Confederate treasury notes or bills do not pretend to have been emitted by a state, or a combination of states of the Union; nor can it be inferred from indicia found upon them, nor can their recondite * his- 108 tory show, that they emanated from the sovereign power, and on the faith of any of the states. And thus it will be seen that they did not possess the characteristic attributes of bills of credit, in accordance with the definition of the supreme court of the United States; they did not issue by virtue of the sovereignty of the state, nor did they rest for their currency on the faith of the state pledged by

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a public law. *Darrington et al. v. State Bank of Alabama*, 13 How. 12.

Notwithstanding these notes or bills were not, in my judgment, bills of credit within the prohibition contained in the 10th section of the 1st article of the Constitution; yet they were none the less illegal; they were issued by a pretended government, organized in the name of states, by subjects and citizens of the United States, and who, at the very time, were in rebellion against their rightful government, and whose design and object was to "dismember and destroy it." *The Prize Cases; Shortridge v. Mason, supra.*

It may not be wholly unimportant to remark, that it is a well established doctrine of the courts, that a wide distinction exists between an *executed* and an *executory* contract. In the former, they will not, as a general rule, interfere between the parties, to set the contract aside, but will leave them where they placed themselves; and this, too, notwithstanding the contract be, in part, or in whole, founded on an illegal consideration. And one owning property may, if no fraud be put upon him, and no misrepresentation, or circumvention, or coven, enter into the transaction, alienate it absolutely, for what currency or thing he pleases, or even give it away. But an executory contract, like this claim of Bailey, the trustee, against the assets of the bankrupt Milner, will not be enforced. The principles of law directly applicable to executory contracts, based upon illegality, were long since determined by the courts, both in England and in this country. One case only will be referred to. The doctrine, as laid down by Mr. Justice Washington in *Toler v. Armstrong*, 4 Wash. 296, is so succinctly announced, that it is best it be given in his own words: "I understand the rule, as now already settled, to be that where the contract grows *immediately* out of, and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be, in part only, connected with the illegal transaction, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it."

John Sedgwick v. William Menck *et al.*

If this demand of twenty-five hundred dollars were allowed, the dividends of the creditors, arising from the assets, would be diminished that amount; and this without any fault on their part, but wholly through the illegal dealings of the bankrupt and others. Bankrupt Law, section 22.

I may add, that the law, in allowing a guilty party to take advantage of the illegality of his own act (as is here done by the bankrupt) does so, not with a view of conferring a benefit on him, but upon grounds of public policy, and also in this case, that justice may be done to the creditors of Milner.

The decision of Mr. Register Murray is approved. The clerk will certify this opinion to Mr. Register Murray.

February 18, 1868.

U. S. DISTRICT COURT, S. D. NEW YORK.

An injunction may be issued out of the United States district court, sitting in bankruptcy, to restrain certain creditors of the bankrupt from all further proceedings in a state court, and from intermeddling or interfering with the bankrupt's property, which had been fraudulently assigned by him, before the commencement of proceedings in bankruptcy, to an assignee of his own selection.

JOHN SEDGWICK, *assignee of* ANDREW BEISER v. WILLIAM MENCK & CHARLES B. BOSTWICK.

BLATCHFORD, J. On a bill filed by the assignee, setting forth that in 1857 the bankrupt had made an assignment of his real and personal estate to the defendant Menck; that such assignment was in fraud of Beiser's creditors; that Menck still had the property or the proceeds thereof; that the defendant Bostwick, as receiver, had obtained a judgment of the court of common pleas of this city, setting aside said assignment as fraudulent and void, and directing the transfer of the property to such receiver; that an appeal from such judgment was now pending undetermined in the court of appeals; an injunction had been issued restraining the defendants from all proceedings in the court of appeals,

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and from intermeddling or interfering with the assigned property or the proceeds thereof. Messrs. C. Bainbridge Smith and N. B. Hoxie, for Mr. Bostwick, the receiver, applied to modify or vacate the injunction. Mr. Banks appeared for the assignee. It was insisted that by force of the bankrupt act, the assigned property had become vested in the assignee for the benefit of all the creditors of the bankrupt, and to be administered in this court by the assignee, and that either an affirmance or reversal of the judgment of the court of common pleas might, by ripening a lien or declaring the judgment erroneous, very materially interfere with the rights and duties of the assignee. After argument, his honor sustained the injunction and denied the motion to vacate or modify the same.

* U. S. DISTRICT COURT, NEW JERSEY.

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The suspension of payment by a manufacturing company, and non-resumption of payment within fourteen days, does not of itself constitute an act of bankruptcy unless such suspension is fraudulent.

Leave granted to amend the petition by the insertion of the word fraudulent in the allegation as to suspension of its commercial paper.

In re JERSEY CITY WINDOW GLASS COMPANY,

IN behalf of the debtors it was insisted in this case that as the suspension of payment, by the company, and their non-resumption within fourteen days, was not alleged to be fraudulent, no act of bankruptcy had been committed.

In answer, counsel for petitioner referred to the opinion of Judge Hall of the Northern District of New York (N. B. R. vol. 1, p. xxxvii), and also to the opinion of the district judges of South Carolina and Minnesota, by all of whom it was held, that a *fraudulent* stoppage of payment was in itself an act of bankruptcy, without reference to resumption, and that a mere suspension, without fraud, con-

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tinued for fourteen days, was another and distinct act of bankruptcy.

FIELD, J. The only act of bankruptcy alleged in the petition is that the Jersey City Window Glass Company suspended payment of their commercial paper, and did not resume within a period of fourteen days. There is no allegation that this suspension and non-resumption were fraudulent. This, it is contended, is an act of bankruptcy within the meaning of the 39th section of the bankrupt act. I am aware that this construction has been sanctioned and adopted by the judges of several of the district courts. My attention has been more than once called to the opinion of Judge Hall of the Northern District of New York; but with all my respect for his learning and ability, I have never been able to bring my mind to the conclusion which he has reached. The language of the clause under consideration is: "Who being a banker, merchant, or trader, has fraudulently stopped or suspended, and not resumed payment of his commercial paper, within a period of fourteen days." It is insisted that here are two distinct acts of bankruptcy created and described; the first, a fraudulent stopping, which is in itself an act of bankruptcy, and upon which proceedings may at once be instituted; and the second, a mere suspension of payment, without any fraud, and which only becomes an act of bankruptcy by being continued for a period of fourteen days.

It is possible, I admit, to read this clause in such a way as to make it seem to bear such a construction. But it can only be done by making a distinct pause after the word "stopped," and then reading in one breath the remaining part of the sentence. But is that the way in which any one would ever think of reading it? Is it the natural and ordinary way? Would not such a construction, to say the least, be a strained one? Would it not be doing violence to the language, and wresting it from its obvious sense and meaning? And would it not make the whole sentence, not only very awkward, but a very ungrammatical one? In this respect, it would be in

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striking contrast with the rest of the act, in which, as it seems to me, much more attention has been paid to clearness of expression, the correct use of language, and the rules of grammar, than is usual in acts either of our national or state legislatures. But why depart from the plain and obvious meaning of the language employed, and resort to a construction so forced and unnatural? For the purpose, it is said, of carrying out the general intentions of congress in the passage of the bankrupt law. Now it is very well known that this law is in a great measure based upon the English statutes of bankruptcy. Almost every act of bankruptcy enumerated in the 39th section is to be found in the English statutes, where they are described in substantially the same terms. If, then, the fraudulent stopping of payment by a banker, merchant, or trader of his commercial paper, and the suspension without fraud for a period of fourteen days, were two distinct and well known acts of bankruptcy under the English law, we might naturally expect to find them in our own act, and might very well imagine that we had found them, in the clause referred to, although certainly not very clearly expressed. But it so happens that there are no such acts of bankruptcy known in the English law. It is true that by their bankrupt acts, the suspension of payment by a debtor is resolved into an act of bankruptcy, by summoning him before the court of bankruptcy, and if such debt is not paid or arranged to the satisfaction of the creditor within a prescribed time, such non-payment or non-arrangement constitutes an act of bankruptcy. But a fraudulent stopping alone, whether followed by a resumption or not, is an act of bankruptcy never before heard of. If, therefore, it was intended by the framers of our act to make this for the first time an act of bankruptcy, it might be presumed that they would have declared their intention in clear and unmistakable language. Certain it is, that we ought not to wrest their language from its plain and obvious meaning in order to infer that they had any such intention.

But what is meant by a fraudulent stopping? Does it

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mean that the debtor is unable to pay, that he is insolvent? If so, he ought to stop. He has no right under those circumstances to pay one creditor to the exclusion of another. This of itself would be an act of bankruptcy. It must mean, therefore, if it means anything, an unwillingness to pay, although he has the means of doing so. But suppose he pays the day after his commercial paper arrives at maturity. Would not that negative the idea of fraud? Must we not wait, therefore, to see whether payment is resumed within a reasonable time, before we pronounce the original suspension to be fraudulent? Undoubtedly the stopping payment might be accompanied by circumstances which would clearly indicate a fraudulent purpose; such, for instance, as the concealment or removal of property or the fraudulent sale or conveyance of it. But these would be in themselves independent acts of bankruptcy, upon which proceedings might be instituted. But how the mere act of suspension, if followed by resumption within a few days, could be deemed fraudulent, I do not very well see. I do not believe, therefore, it was the intention of congress to make the stopping of payment, under any circumstances, an act of bankruptcy in itself, and without reference to resumption. If the debtor is perfectly solvent, and if he resumes payment within the fourteen days, so that no one is defrauded, why should he be adjudged a bankrupt?

What, then, is the true meaning and intent of the clause in question? I understand it to mean, according to the obvious sense of the language made use of, that when a banker, merchant, or trader fraudulently stops or suspends payment of his commercial paper, and does not resume within fourteen days, he commits an act of bankruptcy. To constitute the act, there must be a stopping or suspension of payment, and also a non-resumption within fourteen days, and such suspension and non-resumption must be fraudulent in the sense in which that term is here employed. If the debtor is able to pay, if he has the means of paying, and does not do so, then undoubtedly he commits a fraud upon

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the creditor who holds his paper. And if he is unable to pay, if he is insolvent, then he commits a fraud upon his other creditors, by not having himself declared a bankrupt, and making a surrender of his property to be equally distributed among them.

It will be seen that this act of bankruptcy is confined to bankers, merchants, and traders, and that it extends only to the non-payment of commercial paper, that is, to negotiable securities, to bills of exchange and promissory notes.

114 These * are securities of a peculiar kind, well known to the law, and held in high respect. There is an especial dishonor attached to their non-payment. There is a sort of commercial sanctity about them. They are intended to pass from hand to hand; they are valuable instruments of commerce; they perform many of the functions of money. If, therefore, a banker, merchant, or trader suffers paper of this description to be dishonored, and does not resume payment within fourteen days, it argues such a state of insolvency on his part, as to make it a fraud upon his creditors not to surrender his property for equal distribution among them. Such a suspension and non-resumption may well be termed fraudulent. I do not mean to say that it would be conclusive evidence of fraud, but it would certainly be *primâ facie* evidence, and it would cast upon the debtor the burden of proving that he was perfectly solvent, and that such suspension and non-resumption would not have the effect of defrauding either the holders of his dishonored paper, or any of his other creditors.

Such a construction of the clause in question makes the whole consistent and intelligible, and would render it somewhat analogous to that provision of the English bankrupt law, to which I have adverted.

It would be difficult to imagine any case better calculated than the one now before the court, to illustrate the justice and propriety of such a provision. It is alleged on the part of the debtor, and not denied by the counsel of the company, that they have issued a series of promissory notes, falling

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due at successive periods, and that they are utterly unable to pay them. It is admitted, also, that they had it in contemplation to apply by their petition to be declared bankrupts, but that upon taking the advice of counsel they concluded not to do so. Now it would be a serious defect in our bankrupt act, if no provision were made by which the creditors of such a company could compel them to surrender all their estate and effects for the benefit of their creditors, without proving any other facts than their continued suspension and utter insolvency. If, therefore, it had been alleged in this case that such suspension and non-resumption within fourteen days were fraudulent, I should have had no hesitation in declaring it to be an act of bankruptcy. I see no objection, however, to allowing the petition to be amended by the insertion of that word.

For defendant, *J. F. Randolph* ; for petitioner, *J. Dixon*.

U. S. DISTRICT COURT, S. D. NEW YORK.

A bankrupt who has sworn falsely in his affidavit annexed to his inventory of property, and on his examination before the register, and has concealed his property, by covering it up in the name of his wife, forfeits his right to a discharge.

In re WILLIAM D. HILL.

BLATCHFORD, J. The discharge of the bankrupt is opposed by William S. Preston, a creditor. The specifications in opposition filed by the creditor, aver that "the evidence taken before the register shows beyond all reasonable doubt, that the bankrupt has wilfully omitted from his sworn and filed schedules and inventories, property which in truth and in fact belonged to him at the time of making and filing his said schedules and inventories, to wit: a certain house and lot situate in the village of Kingston, claimed to have been purchased by his wife of Jeremiah Russell ; a certain promissory note made by one McKinstry for \$1,000, one of Jere-

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miah Green, one of H. S. Van Etten, and other notes in addition to bonds, mortgages, and other evidences of debt and property, which will more fully appear from the evidence taken; that the said bankrupt, with intent to defraud his creditors, has fraudulently placed his property in the hands of his wife, with intent to prevent it from being reached by his creditors, and applied in satisfaction of their debts, and that his wife so held his property at the time of filing the petition aforesaid; that the said bankrupt has withheld his books, papers, and documents relating to his business; that he has omitted from his schedules all claims and demands which he has against his wife, for services rendered for her as her agent, if, in fact, he was such agent, and which, in equity, belong to the creditors, and are unpaid for."

The bankrupt and his wife, and other witnesses, have been examined. I have carefully gone over their testimony, and am entirely satisfied that the allegations of the specifications above referred to, are fully proved. The case is one of a deliberate attempt, by the bankrupt, to defraud his creditors, and yet procure a discharge from his debts. He has wilfully sworn falsely in his affidavit annexed to his inventory of property, and, on his examination before the register, in the course of the proceedings in bankruptcy, in regard to material facts concerning the property owned by him at the time of filing his petition in bankruptcy, he has concealed his property by covering it up in the name of his wife, and has been guilty of fraud, contrary to the bankrupt act, by not delivering to his assignee property which belonged to him at the time of presenting his petition and inventory, and which he was not permitted to retain under the provisions of the act, and has made a fraudulent gift or transfer of property to his wife, contrary to the provisions of the act. He has committed all these offences, which are made grounds, by section 29 of the act, for withholding his discharge; and then he has crowned the whole by taking and subscribing the oath required by section 29, to the effect that he has not

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done, suffered, or been privy to any act, matter, or thing specified in the act as a ground for withholding his discharge.

In his inventory of his estate, annexed to his petition, he sets forth that he has no property, except \$200 worth of property, that is exempted by section 14 of the act; and his assignee makes a return of no assets. The evidence shows that the bankrupt claims to have done business for several years past as agent for other persons, and not on his own behalf, first, as agent for one McMullen, and afterward, and down to the time of filing his petition, as agent of, and in behalf of his wife. The testimony, and particularly the examination of the bankrupt and his wife, shows that these pretended agencies, and especially the one for his wife, were mere shams and covers for frauds. The prevarications of the bankrupt in his testimony, his reluctance to disclose the truth, his want of recollection as to matters which he could not well have forgotten, and his failure to give any satisfactory explanation of the terms of his agencies, and the nature and amount of his compensation as agent, all tend to show beyond question that the whole arrangement was one devised and carried out to defraud his creditors, and that the bulk of the property which stood in the name of, and was in the possession of, his wife, at the time his petition was filed, was, in fact, his own property. The attempt to show that his wife derived the property from any other source than from him, utterly failed. The debts set forth in his schedule were all of them contracted in 1861. He was married in 1860. His wife had then no property except some household furniture of the value of \$225, which he purchased and gave to her before their marriage. She has inherited no property since, nor received any from any other person than her husband. In September, 1861, he failed, and made an assignment of all his property for the benefit of his creditors. Since that time he has carried on business as agent for McMullen and for his wife. His wife's furniture was sold in 1864 for \$600. The attempt to show that Mrs. Hill had capital enough growing out of the investment of this \$600, and the buying of notes on her behalf

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prior to the 18th of April, 1867, and the transactions on her behalf with John Grant, in regard to mules, prior to that time, to establish the extensive business which, on and after that date was done for her by her husband as her agent, is absurd. At that date a bank account was opened in her name with the Ulster County National Bank, at Kingston, and her husband's agency for McMullen ceased about the same time. It is quite clear that the capital was really the property of her husband, and was the fruit of the business he had been transacting since he failed in 1861, nominally as agent for Mrs. McMullen, but really on his own behalf. Mrs. Hill, in her testimony, shows that she knew nothing about what her husband was doing in her name in the way of business, and that she had no connection with it except to sign notes and checks as he brought them to her, filled up and ready to be signed. From April, 1867, to January, 1868, the deposits in the name of Mrs. Hill in the bank amounted to nearly \$25,000; and Hill testifies that a large amount of her transactions do not appear upon her bank book; that some of the notes he bought for her were discounted at other banks; that he bought about \$50,000 worth of notes as her agent, and dealt largely in other things as her agent, buying and selling mostly for cash. The house named in the specifications was purchased from Jeremiah Russell for \$5,750 in the fall of 1866. Of this amount, \$1,750 was paid in cash, being raised on a note signed by Mrs. Hill, and she took a deed of the house and gave back a mortgage on it for \$4,000. But the evidence as to the transaction shows that the purchase was really by her husband, and that the note on which the money was raised to make the cash payment was paid with his money, if it has been paid. The bankrupt has kept no account of his dealings for his wife as her agent, and has never rendered to her any account, and she has never paid him or agreed to pay him anything for his services.

The case is a plain one for refusing a discharge.

Cooke & Lounsbery, for the bankrupt; *William Lawton*, for the creditor.

April 9, 1868

In re Oliver W. Dodge.

• U. S. DISTRICT COURT, S. D. NEW YORK. 115

Where at the time of the application for a discharge, the assignee has neither received nor paid any moneys on account of the estate, the case is to be regarded as one in which no assets have come into his hands.

In re OLIVER W. DODGE.

I, HENRY W. ALLEN, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by Messrs. Martin & Smith, the counsel for the bankrupt.

The only assets of the bankrupt consist of certain notes, accounts, and claims, all past due and unpaid, in which he had a one seventh interest valued at two hundred and fifty dollars, which interest has passed to the assignee, Mr. John Sedgwick, who has not received or paid any moneys whatever, for, or on account of, the bankrupt's estate.

One or more creditors have proved their claims against the estate of the bankrupt.

More than sixty days having elapsed since the adjudication of bankruptcy, can the bankrupt now apply to the court for his discharge under section 29 of the act, on the ground that there are no assets; are accounts, claims, and demands from which nothing may be collected or realized, considered to be assets within the meaning of said section 29, so as to prevent the bankrupt from making application for his discharge until after the expiration of six months.

And the said parties requested that the same should be certified to the judge for his opinion thereon.

Dated at the city of New York, the 27th day of March,
A. D. 1868. HENRY WILDER ALLEN, *Register.*

BLATCHFORD, J. Where at the time of the application for a discharge, the assignee has neither received nor paid any moneys on account of the estate, the case is to be regarded

In re Charles H. McIntire.

as one in which no assets have come to his hands, within the meaning of section 29 of the act. This is the interpretation given to such expression "no assets" by the justices of the supreme court. Form No. 35 is headed "assignee's return where there are no assets;" and that form consists merely of the oath of the assignee that he has "neither received nor paid any moneys on account of the estate."

The clerk will certify this decision to the register, Henry Wilder Allen, Esq.

April 6, 1868.

U. S. DISTRICT COURT, S. D. NEW YORK.

Incomplete specifications in opposition to a discharge in bankruptcy, may be amended in due course.

A discharge in bankruptcy will not be vacated on general averments.

In re CHARLES H. MCINTIRE.

THIS was a petition on the part of a creditor to have the discharge, granted in this case, vacated.

BLATCHFORD, J. *First.* The proceedings in this case were regular and the discharge was properly granted. The specifications of grounds of opposition to the discharge were too vague and general to be triable. The attorney for the creditor had ample opportunity after the decisions of the court on the question of the sufficiency of specifications were made, and before the discharge in this case was granted, to apply to the court for leave to amend the specifications, and the facts in evidence show that he was guilty of laches in not doing so after his attention was called to their probable insufficiency.

Second. If there had been no laches in the case, still the petition now presented that the discharge be vacated, and that the creditor be allowed to file amended specification and oppose the discharge, sets forth no specific grounds of opposition. It is as vague as were the specifications filed. It

In re George S. Mawson.

merely sets forth that the attorney for the creditor believes that, if the case is tried on its merits it can be shown that the bankrupt has a large amount of personal property which he has not put in his schedule of assets, or passed over to the assignee in the case. Even if this is to be regarded as an averment that the bankrupt had such property when he filed his petition, it is too vague to found any action of the court upon. The discharge would have been granted notwithstanding so vague a specification, and, having been granted, it cannot be impeached on a petition containing only so vague an averment.

Third. I have looked into the testimony of the bankrupt taken before the register in this case, and his testimony taken on the supplemental proceedings in the state court, and can see no grounds for questioning the *bona fides*, fairness, or validity of the transfer of his property to his brother in August, 1862, and no reason to suppose the bankrupt failed to insert in his schedule of assets all the property he had at the time, or failed to deliver to his assignee all the property he was bound to deliver to him.

The prayer of the petition is denied.

F. C. Nye, for the bankrupt; *Salter & Coving*, for the creditor.

U. S. DISTRICT COURT, S. D. NEW YORK.

A specification in opposition to a discharge in bankruptcy, that the bankrupt has "influenced the action" of certain creditors by a pecuniary consideration and obligation, is sufficiently distinct to be triable.

In re GEORGE S. MAWSON.

BLATCHFORD, J. The first and third specifications of the grounds of opposition to the discharge are altogether too vague and general. The first is that the bankrupt has concealed part of his estate, and has been guilty of fraud in not delivering to the assignee all of the property belonging to

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him at the time of the presentation of his petition and inventory. It ought to specify, with some particularity at least, what part of his estate he has concealed, and what property he has fraudulently failed to deliver. The third specification is, that in contemplation of becoming bankrupt he has made a transfer or conveyance of part of his property for the purpose of preventing the same from coming into the hands of the assignee, and of being distributed according to law in satisfaction of his debts. It should state what part of his property he has so transferred.

The second specification is, that he has procured the assent of Arnold, Nusbaum & Nordlinger, creditors, to his discharge; and that he has influenced the action of the said creditors since the filing of his petition by a pecuniary consideration and obligation. A bankrupt is not forbidden by the 29th section of the act to procure the assent of a creditor to his discharge, nor is he forbidden to influence the action of a creditor. The prohibition is against procuring such assent by any pecuniary consideration or obligation, and against influencing such action by any pecuniary consideration or obligation. The second specification in this case only avers, in regard to procuring the assent of the creditors to the discharge, that the bankrupt procured such assent, and does not aver that he procured it by any pecuniary consideration or obligation. It is, therefore, insufficient in that respect. In regard to influencing the action of the creditors, the specification names the creditors, and states that the influencing took place after the filing of the petition, and was by a pecuniary consideration and obligation. It does not state what the influencing consisted in, but it may, perhaps, fairly be inferred, that the specification means that it consisted in procuring the assent of the creditors named to the discharge. No other influencing can be given in evidence under the specification. The time is, perhaps, sufficiently averred, and, although the amount of the pecuniary consideration or obligation is not stated, I am inclined, on the whole, though with considerable hesitation, to hold the specification suffi

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cient in its averment in regard to influencing the action of the creditors named, in the respect above defined.

It borders very much, however, on a fishing specification, as, if the party had any facts within his knowledge or information, it is to be supposed he would have specified them. This decision must not be regarded as a precedent except for a case identically like it in all respects. The rule in regard to specifications has been so often heretofore defined by this court that it ought by this time to be well understood.

The case will stand for hearing on so much of the second specification as is so held to be sufficient, and will be heard whenever the parties have taken all the testimony they desire to present on the point. A reference may be had to the register in charge to take testimony on either side.

F. C. Nye, for the bankrupt; *J. Solis Ritterband*, for the creditor.

U. S. DISTRICT COURT, N. D. NEW YORK.

A debt against a bankrupt's estate may be proven before a United States commissioner, although the bankrupt and creditor both reside in the same judicial district.

A debt barred by the statute of limitations of the state in which the bankrupt resides, may still be proven against his estate in bankruptcy.

A creditor who, after making his deposition to prove his debt, retains possession of the deposition, and does not allow it to pass into the hands of the assignee in bankruptcy, is not a creditor who has proven his debt.

Any creditor of a bankrupt may oppose the discharge, whether he shall have proven his debt or not.

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HALL, J. This case came on to be heard upon the petition of the bankrupt for "a full discharge from all his debts, and a certificate thereof;" and upon due proof of the service and publication of notice of the order to show cause against such discharge, as required by the bankrupt act, the General Orders in Bankruptcy, and the rules of this court.

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At the time fixed for showing cause, two of the bankrupt's creditors, whose debts were set forth in the schedules annexed to his original petition, entered their appearance, and proposed to contest his right to a discharge; whereupon it was objected that they were not "*creditors who had proven their debts*," and consequently had no right to be heard.

It was also insisted that the alleged debts, which such creditors had attempted to prove, were barred by the statute of limitations of New York, where such debtor and creditors resided; and that such alleged debts, being so barred by the statute, the parties appearing were not creditors, and had no right to contest the bankrupt's discharge.

It was conceded that a deposition in proper form for the proof of the debt of one of the creditors had been made before a commissioner appointed by the circuit court, and that such deposition had been duly transmitted to the assignee; but it was insisted that the commissioner had no authority to take proof of such debt, inasmuch as the creditor was, at the time, a resident of this judicial district.

The question thus presented is not free from doubt. The 22d section of the bankrupt act declares "that all proofs of debts *against the estate of the bankrupt*, by, or in behalf of, the creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by, or in behalf of, non-resident creditors before any register in bankruptcy in the judicial district where such creditors, or either of them, reside, or before *any* commissioner of the circuit court authorized to administer oaths in *any* district."

116 * There is, in the language of this provision, no clear indication that congress intended that the right to prove their debts before a commissioner should be confined to creditors not residing within the judicial district in which the proceedings were pending. The sentence is punctuated by commas only, so that we have not even the indication of that intention, which would have been given if a semicolon, instead of a comma, had been inserted after the words "said

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district;" but on the other hand there is not the indication of a different intention which would have been given if a semicolon, instead of a comma, had been inserted after the word "*reside*." So far as the punctuation, the particular language, or the grammatical construction of the sentence furnish any evidence of the intention of congress in respect to this question, it is more favorable to the construction which would sustain the authority of the commissioners in this case than to the opposite construction; for the concluding portion of the sentence is, in these respects, as closely connected with the first portion of the sentence as with the second or middle portion. It is true that the concluding portion of the sentence is separated from the portion of it which provides for the proof of debts by resident creditors, but this separation furnishes no reliable evidence that congress intended to deny to resident creditors the right to prove their debts before a commissioner, for the connection of the three provisions in one sentence necessarily required that those placed first and last should be separated by the interposition of the other.

The intent to require all proofs made before registers to be taken before a register of the judicial district in which the creditor resides, is clearly expressed; and it is probable that the concluding lines of the sentence, which authorize proof before commissioners, were added by way of amendment, — perhaps by another hand, — without a careful consideration of their import when connected with the preceding provisions. The difference between the concluding provision and the two preceding ones is strongly marked. In the first two of these provisions the authority of the registers is expressly limited by the words, "in said district," in the one case, and by the words "in the judicial district where such creditors, or either of them, reside," in the other; but no words of limitation are found in this concluding provision. On the contrary, there are very clear indications that this provision was intended to be more general and comprehensive; for the unlimited term *any* is twice used, first in reference to the commissioner, and again in reference to the district. If it was

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not intended to give a creditor residing in the judicial district where the proceedings are pending the right to prove his debt before a commissioner, it would seem that the right would have been limited by the use of the words "in said district" at the conclusion of this sentence, as had been done in the first clause; but instead of this the general words "in any district," are used. And these words, which conclude the sentence, can have no legal effect unless they are held to give the alternative right to resident as well as to non-resident creditors. If the words "in any district" had been omitted, this right would still have been clear as to non-resident creditors, though more doubtful than it now is in respect to creditors residing within the judicial district where the proceedings are pending.

This alternative right to prove debts before a commissioner was doubtless conceded for the convenience of creditors; and the reasons of convenience which required it to be extended to non-resident creditors, equally required its extension to resident creditors also. So far as the convenience of the creditor is concerned, it is immaterial whether the debtor's petition is pending in the judicial district in which the creditor resides, or in another district.

If it be suggested that congress may have desired to secure to the registers, rather than to the commissioners, the fees for taking such proofs, the ready answer is, that if such a desire was allowed to influence the action of congress in respect to resident creditors, it is impossible to assign any satisfactory reason for limiting its influence to the case of resident creditors, instead of extending it to both resident and non-resident creditors.

These considerations seem to require that the provisions of the statute should be so construed as to give this alternative right to resident as well as to non-resident creditors. And I adopt this construction more willingly, as a different construction would invalidate the proof of many debts taken in good faith before commissioners, when the creditors were residents of the district in which the proceedings were pending; for

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the more liberal construction has been frequently, if not generally given to this provision, by registers and commissioners, as well as by practitioners in bankruptcy. Indeed, in the present case, it was shown by affidavit that the proof was made before a commissioner, under the advice of the register having the case in charge, that the creditor, though resident in this district, might make proof of his debt before a commissioner as well as before the register.

The proof referred to will be held sufficient and the creditor regarded as one who has proved his debt and is entitled to oppose the discharge.

Before reaching the conclusion just stated, I have necessarily considered the objection that the debts of the opposing creditors were barred by the New York statute of limitations. This statute (like the statutes of limitations of most of the states of the Union) does not, in terms, provide that the debt shall be extinguished by the lapse of time required to constitute the statute a defence to an action brought in the courts of New York, and it is a good defence only when specially set up by answer, as a defence to an action brought in this state. The statute, therefore, simply affects the remedy, and it leaves the creditor at liberty to pursue in another state any remedy authorized by the laws of that state.

It is believed that in some of the states, as in Iowa (Code of 1851), Indiana (Civil Code, 1852), and in Ohio (R. S. 1854), it is provided by statute that actions shall not be brought on demands barred by the statutes of limitations of the states where the cause of action arose ; and in some states their statutes may, in terms, provide that the debt shall be extinguished by the lapse of time ; but the statute of this state contains no such provision. And it does not purport to extinguish or destroy the debt ; and such is doubtless the case in all, or nearly all of the states of the Union.

That the operation of such statutes does not annul or extinguish the debt, but only affects the remedy, and that such statutes have no effect out of the state in which they are passed, will sufficiently appear upon an examination of the

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following authorities: *Rawls v. Am. Life Ins. Co.* 36 Barbour, 357; *McElmoyle v. Cohen*, 13 Peters, 312; *Townsend v. Jemison*, 9 Howard, 407; *Gans v. Frank*, 36 Barbour, 320; *Power v. Hathaway*, 42 Barbour, 214; *Ruggles v. Keeler*, 3 Johnson Rep. 263; *Bulger v. Roche*, 11 Pickering, 39; *Dwight v. Clark*, 7 Mass. 515; *Decouche v. Savier*, 3 John. Ch. Rep. 190; *Lincoln v. Battile*, 6 Wendell, 472; *Byrne v. Crowninshield*, 17 Mass. 55; and *Medbury v. Hopkins*, 3 Conn. Rep. 472. See, also, *Olcott v. Tioga R. R. Co.* 29 N. Y. Rep. 210; 1 Kent Com. (10th ed.) 261, 262, and notes; and 2 *Ib.* 462, 463; Story Conflict of Laws, sections 576, 577, 5820, 5826.

The debt, then, exists, and in most of the states of the Union an action can be sustained against the debtor if found within their jurisdiction. This right of the creditor, considering the migratory habits of our people and their known propensities to travel from state to state, is a valuable right, which would be barred by the discharge; and I shall concur in the opinion of my learned brother of the Southern District upon the question, and hold that the fact that the creditor's remedy for his debt, by suit in New York, is barred by the statute of limitations, does not prevent the proof of such debt or bar his right to oppose the discharge of the bankrupt.

It must be conceded that the question is not free from embarrassment, and that it has been differently decided by the learned judge of the Massachusetts district, who relied, in part, at least, upon the English decisions. In that country it has been settled, after much conflict of judicial opinion, that a debt barred by the English statute of limitations is not provable in their bankruptcy courts (*Ex parte Dewdney*, 15 Vesey, 498; 1 Christian Bankruptcy, 221, and notes), but the circumstances under which the question was decided there are very different from those under which it is presented here. Their statute of limitations and their bankrupt act exist by the same legislative authority, and the operation of the statute is, territorially, coextensive with the proper force and operation of the bankrupt act; but in the United

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States statutes of limitations have no effect beyond the territory of the single state which enacts them, while a discharge in bankruptcy under the laws of the United States, operates with equal force in every state of the Union.

The English statute of limitation operating throughout the whole of England, and it being there held that a foreign creditor (one whose debt was contracted and to be paid elsewhere than in England, whether in the United States, France, Germany, or an English or foreign colony) would not, even when suit for its collection was brought in an English court, be barred by a discharge in bankruptcy granted in England, unless the foreign creditor voluntarily made himself a party to the proceeding (*Eden on Bankruptcy*, 422, 423; *Smith v. Buchanan*, 1 East, 6), there is much reason for the adoption of the English rule there which does not apply here.

Our own courts hold that a bankrupt's discharge in a foreign country does not discharge a debt made in and with reference to the laws of this country (*Green v. Sarmiento*, Peters C. C. Rep. 84; *Zarega's case*, 1 N. Y. Legal Observer, 40, note), agreeing in this respect with the English doctrine.

It may also be conceded that the propriety of allowing debts barred by the statute to be proved in bankruptcy may be opposed with much force of argument, by reason of the apparent injustice of allowing it in particular cases; but on the other hand, arguments of at least equal force may be urged against the opposite rule. In respect to questions arising under statutes of limitations, the *lex fori* prevails, and if the statutes of the state in which the bankruptcy proceedings are pending are to furnish the rule of limitation, the New England creditors, by simple contract of a bankrupt who has resided in this state for five years, or for only five months, may prove their debts of twelve years' standing when, if he had not changed his residence, they would not have been provable; and a bankrupt who resided and was largely indebted to relatives in New Jersey, where the statute of limitations would be a good bar, might carry on business for four months

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in the city of New York, and then present his petition in bankruptcy there, and allow all his New Jersey creditors, whose debts were barred by their statute of limitations, to prove their debts. Again, the states may at any time modify their statutes of limitations, and if the State of Wisconsin or Virginia should provide by statute that no action for any debt, or for any debt due to a resident of another state, should be maintained after six months from the time the cause of action accrued, would the act be binding upon the United

States bankrupt courts? Or, if a state should pass

117 * an act that no debt should be proved in bankruptcy proceedings in that state after the expiration of six months from the time the debt accrued, would the bankruptcy courts regard such an act? The adoption of the statutes of limitation of the particular state, in which the proceedings in bankruptcy are pending, would, in many cases, give the bankrupt the power to determine whether the statutes should, or should not, be a bar by remaining a resident of the state where he had long resided, and whose statute of limitation would be a good bar; or by removing to, and making his application in, another state, where the statute would be no bar.

But it is unnecessary to pursue this line of argument. The real question is, whether a debt against which the statute of limitations of this state has run is still a debt, and that it is there can be no doubt. If it is still a debt there is no statute of the state, or of the United States, which provides that it shall not be proved or allowed in proceedings in bankruptcy; and until some statute of limitations shall be adopted by congress for the guidance of courts of bankruptcy no uniform or satisfactory rule of limitation can be applied by those courts. And even if they could devise a uniform and satisfactory rule, I can find no authority for those courts to provide, or adopt from the statutes of the state, any such rule of limitation.

In respect to the claims of the other opposing creditor, it was shown that he had appeared before the register having this case in charge, and had made a deposition, drawn up by

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the register himself, in the proper form for the proof of such creditor's debt, but that such deposition had been retained in the hands of the creditor, or his attorney, and had never been delivered or sent to the assignee. It also appeared that the creditor had afterwards commenced a suit against the bankrupt for the purpose of obtaining a judgment in a state court for the amount of his debt, and had retained possession of the deposition referred to until it was filed with the clerk, at the time of entering his appearance in opposition to the bankrupt's discharge. It was insisted, upon this state of facts, that the court ought not to allow the creditor to oppose the bankrupt's discharge.

The 22d section of the bankrupt act, after prescribing the manner and form of making the proof of a debt by deposition, further provides as follows: "If the proof is satisfactory to the register, or commissioner, it shall be signed by the deponent, and delivered or sent by mail to the assignee, who shall examine and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept for that purpose, the names of creditors, who have proved their claims," &c: and it is evidently the intention of the act that the register or commissioner taking the proof shall decide, in the first instance, upon the sufficiency of the proof. If the proof is satisfactory, the officer is to deliver it to the assignee, or send it to him by mail; and this act of the officer is the only evidence, that the proof is satisfactory, which has been provided for, either by the statute or the general orders and forms prescribed by the justices of the supreme court. The return of the deposition to the creditor, when entirely unexplained, would seem to indicate that the proof was not satisfactory; or else that the creditor did not intend to complete his proof and become thereby a "creditor who had proved his debt;" and the subsequent act of the creditor in commencing a suit against his debtor (which, under the 21st section of the act, he had no right to do if he had proved his debt), is *prima facie* evidence that the proof was not satisfactory to the register, or else that the creditor

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did not intend, by making the deposition, to become a creditor who had proved his debt.

Under the circumstances stated, I am of the opinion that the creditor, who has now filed the deposition with the clerk, cannot be considered as "a creditor who has proved his debt," within the technical meaning of those terms as used in the bankrupt act.

If this conclusion is correct, the question arises whether a person who shows, by affidavit, or otherwise, that he is a creditor of the bankrupt, has a right to appear and oppose his discharge without being, in technical strictness, "a creditor who has proved his debt?"

This question is one of great importance, and in respect to which there is much difference of opinion. It was stated on the argument that the learned judge of the Southern District of New York had decided against this right; and I am aware that others, whose opinions are entitled to great respect, have expressed similar opinions. It is probable that in making his decision Judge Blatchford relied upon the decision of his learned predecessor in *King's case*, to which I shall presently refer. I have carefully examined that case and other authorities, and after a careful consideration of the provisions of the present bankrupt act, I have reached a conclusion different from that announced by the learned judges of the Southern District. While I regret this difference of opinion, my own convictions are so strong that I feel bound to decide the question in accordance with such convictions, and to state my reasons therefor; and then to leave it to congress to settle the question by legislation, if such legislation shall be deemed expedient.

In discussing the question thus presented, it is proper first to consider the nature and object of the proceeding which requires its determination.

The question can only arise upon the application of a bankrupt for a judicial discharge from all his debts, and these applications are to be granted in most cases without even a partial performance of the legal obligations of the bankrupt. The

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application is to be granted or denied by a court in the regular course of judicial proceedings; and the discharge, if it be properly obtained, is (with few exceptions) a conclusive bar to any suit prosecuted for the collection of a debt, provable against the bankrupt's estate, which existed at the time of the filing of his original petition.

That all creditors whose rights may thus be conclusively barred by the decision of a court of justice, should have the right to be heard in opposition to such decision, is a proposition so plain and self-evident, that it would seem that its obvious truth would be at once admitted, alike by lawyers and laymen, without the thought that either argument or authority might be requisite for its maintenance. If authorities were required it would be easy to produce them in great numbers, and from the highest sources; but two or three will suffice. In the case of *The Mary*, 9 Cranch Rep. 126, 144, Chief Justice Marshall, in delivering the opinion of the supreme court of the United States, said: "It is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence he shall have notice, either actual or constructive, of the proceedings against him."

But notice to a party is worthless, unless he has the privilege of being heard; and Mr. Justice Story, in *Bradstreet v. The Neptune Insurance Company*, 3 Sumner Rep. 600, 607, said: "It is a rule founded in the first principles of natural justice that a party shall have an opportunity to be heard in his defence before his property is condemned," &c. In the case of *Hollingwood v. Burton*, 4 Peters, 466, it was declared by Mr. Justice Trimble at the circuit (p. 472), that "by the general law of the land, no court is authorized to render a judgment or decree against any one or his estate, until after due notice by service of process to appear and defend." And he added: "This principle is dictated by natural justice; and is only to be departed from in cases *expressly warranted by law, and excepted out of the general rule.*" And he further declared (p. 475), that the reason of the rule that judg-

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ments and decrees are binding only on parties and privies "is founded on the immutable principles of justice that no man's right should be prejudiced by the judgment or decree of a court without an opportunity of defending the right," &c. : and all this was concurred in by the supreme court (p. 470).

In view of the principles thus sanctioned by the highest authority, it would seem to be a reproach to the national legislature to hold that it was intended that any creditor whose claims would be barred by a discharge should be deprived of his just right to be heard, in opposition to such discharge ; and certainly an intention to violate those principles of natural justice and deny the creditor's right to be heard should not be imputed to congress unless such intention is clearly expressed, or must necessarily be implied from the language of the statute. *Hollingsworth v. Burton*, 4 Peters, 472. It is certain that no such intention is clearly expressed in the bankrupt act now in force, and it is believed that no such intention can be reasonably inferred from any of its provisions.

But before discussing these provisions it may be proper to refer to the provisions of the act of 1841, and to the decision under the act made by the learned judge who then presided in the Southern District of New York, and which, it is supposed, led to the decision lately made by his successor, under the act of 1867.

In the case of *Brown King* (1 N. Y. Legal Observer, 21 ; S. C. 5 Law Reporter, 302), Judge Betts decided that, under the bankrupt act of 1841, a creditor who had no interest, except in that character, and who had not proved his debt, could not be permitted to oppose a bankrupt's discharge.

That case was decided upon the 4th section of the act of 1841, which provided that no discharge should be granted "until after seventy days' notice in some public newspaper, designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particular time and place to show cause why such discharge and

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certificate shall not be granted ; at which time and place any such creditors, or other person in interest, may appear and contest the right of the bankrupt thereto ; ” and it was upon this language that Judge Betts held that creditors, “ as such, could not rightfully appear in the controversy, but must have the further qualification of having proved their debts.”

It is clear that there was no express exclusion of the right of the creditor who had not proved his debt by the language of the 4th section above quoted. Such a creditor was a person in interest, and as he was not embraced in the class of “ creditors who have proved their debts,” he was, by the ordinary rules of construction, embraced in the other class, of other “ persons in interest.”

In the *Case of Tebbetts*, 5 Law Reporter, 259, Mr. Justice Story said in respect to parties opposing a discharge : “ If they are not strictly, in the sense of the law, creditors of the bankrupt, they are at least equitable creditors ; ” and declaring that their claims would be enforced in a court of equity, he allowed them to oppose the discharge, although (as I understand the case) they were not “ creditors who had proved their debts.”

In the *Case of Book*, 3 McLean Rep. 317, Mr. Justice McLean, in commenting upon and overruling the *Case of King*, said : “ In the *Matter of Brown King*, Southern District of New York, 5 Law Rep. 320, it was held that ‘ the terms other persons in interest used in the 5th section, are employed to designate those who could not prove debts as creditors, and does not embrace, but excludes creditors.’ That these words may embrace those who are not properly creditors, but * have an interest in the matter, 118 may be admitted ; but that they exclude creditors who have not proved their debts, is a gratuitous assumption not warranted by law.”

In *Haxtun v. Corse*, 2 Barbour’s Chan. Rep. 506, 529, the decision in *Brown King’s case* was commented upon by the late Chancellor Walworth, and that eminent jurist expressed the opinion that Judge Betts’s decision was “ an erroneous

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construction of the statute and that the framers of the law intended to give all persons interested in opposing the bankrupt's discharge, as well as creditors who had proved their debts against him, the privilege of appearing and contesting his right to such a discharge."

Under the provisions of the same section of the act of 1841, it is clear that any creditor of the bankrupt, whether he had proved his debt or not, might impeach the discharge (when pleaded as a defence to the suit of such creditor), for fraud or wilful concealment which might have been urged in opposition to the discharge; and if Judge Betts's decision is correct, a creditor who under this same section could not oppose the action of the court in granting the discharge when applied for, could defeat such action after the discharge had been granted. This would be absurd, and I cannot but think that, both upon reason and authority, it may be properly assumed that Judge Betts's decision in *King's case* was a hasty and erroneous construction of the act of 1841.

But the reasoning upon which Judge Betts based his opinion in *King's case* is not applicable to a case arising under the existing bankrupt act. It may be conceded that the 29th section of the present act, which provides for notice to show cause against a discharge, carefully provides for notice to creditors who have proved their debts, and that it does not contain any very clearly expressed provision for giving notice, in terms, to any other parties. It provides that the court shall order notice of an application for a discharge "to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors reside, to appear on a day appointed for that purpose and show cause," &c. Now, though it is not expressly stated that notice must be given to any creditors except those who have proved their debts, it is clearly to be inferred that the publication of the notices is required for the benefit of other cred-

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itors ; for this publication is in addition to the personal notice required to be given by mail to all creditors who have proved their debts, and in providing for the designation of the newspapers in which the publication is to be made, reference is made to the creditors generally, and not alone to those who have proved their debts.

It will also be observed that in this section no reference is made to "other persons in interest;" but the more important, and under Judge Betts's decision the vitally important difference between the acts of 1841 and 1867 is, that although in the act of 1867 there is, in immediate connection with these provisions for giving notice, no provision declaring the right of "creditors who have proved their debts and others in interest," to appear and oppose the discharge, as was the case in the act of 1841, the last of these omissions is supplied by the 31st section of the present bankrupt act, which provides "that *any creditor* opposing the discharge of a bankrupt may file a specification in writing of the ground of his opposition," thus providing for opposition by "any creditor," and not by any creditor who has proved his debt, as in the act of 1841. This is a very important change from the language of the act of 1841; and if the decision in *King's case* was not erroneous it is not an authority against the right of the creditor in this case, for the term *any creditor* can by no just construction be limited to a creditor who has proved his debt.

Notwithstanding the provisions of the acts of 1841 and 1867, which are apparently intended to give permission to creditors, or to creditors and others in interest, to appear and oppose a discharge, it is very clear under the authorities before cited and many others of a similar character, that the courts, in administering these acts, would have allowed such opposition if no such permission had been expressly given; and in order to bar the creditor's right to appear and oppose the discharge, the bankrupt must show that such right has been taken away by the statute, either in express terms, or by necessary implication. *Hollingsworth v. Burton, ubi*

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supra. As has been shown, the act of 1867, in the sections which bear upon this question, only speaks of *creditors who have proved their debts* in the one case, and creditors generally in the other ; and yet Form No. 51 prescribed by the justices of the supreme court of the United States very properly provides for notice to all creditors who have proved their debts “ *and other persons in interest ;* ” although “ other persons in interest ” are not embraced in any of the provisions of the act relating to the application for a discharge, the notice to show cause against the same, or the opposition to be made to such application. Parties who are not creditors are, therefore, to be permitted to oppose a discharge upon principles of justice universally acknowledged by the courts of all civilized countries, and not under any permission given by the bankrupt act.

But it may be said that without any express provision of the statute, or any necessary implication from its language, the bankruptcy courts should require a creditor to show his interest in the proceedings, by proving his debt, before allowing him a standing in court for the purpose of opposing a discharge ; and that requiring him to take the position of a creditor who has proved his debt is no denial of the right which has been declared to be founded in the principles of natural justice, for the reason that such requirement is easily fulfilled. It is conceded that proof of his interest, if it does not clearly appear by the schedules of the bankrupt, may properly be required of the creditor ; but it being certain that a party, in order to become a creditor who has proved his debt, must in many cases relinquish most important rights, and that to impose upon the creditor, unnecessarily, any injurious terms, as a condition of his being heard, is as inconsistent with the principles of justice, and, to the extent of the injury inflicted by the imposition of such conditions, as gross a denial of the just rights of the creditor as an absolute refusal to allow him to be heard, he ought not to be required to become, technically, “ a creditor who has proved his debt.” Very injurious terms will certainly be imposed in many cases

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if it be held that a party must take the position of a "creditor who has proved his debt" against the estate of the bankrupt, before he can oppose his discharge. In many cases in which the application for a discharge is made at the end of sixty days under section 29, on the ground that no assets have come to the hands of the assignee, it will (under the provisions of section 20) be impossible for the creditor to prove his debt, without relinquishing his lien by judgment or mortgage, at any time before the day fixed for the final hearing on the application for a discharge.

By section 20, it is provided that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property and be admitted to prove his whole debt. . . . *If the property is not so sold or delivered up, the creditor shall not be allowed to prove any part of his debt.*"

By section 21 it is provided that "no creditor proving his debt or claim shall be allowed to maintain any suit at law or equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against said bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained thereon shall be deemed to be discharged and surrendered thereby," &c. Why should a creditor holding a mortgage or judgment for \$15,000, partially secured by its lien on \$10,000 worth of real or personal estate, and who is willing that the other creditors of the bankrupt should take all of the property of the bankrupt which is not bound by this mortgage or judgment, be compelled to relinquish his lien, before he is allowed to show fraud on the part of the bankrupt, and defeat his application for a discharge, in order to preserve the right to collect

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his debt out of the subsequently acquired property of the bankrupt? It is quite proper to require a creditor to prove a debt before allowing him to make any motion in respect to the bankrupt's estate in the hands of the assignee; but why should it be required, by the legislature or by the courts, when the creditor only seeks to prevent the bankrupt's discharge? That the legislature has not expressly required it is very clear, and there is strong reason for believing that it was not intended to be required.

By the 35th section of the present act "any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same;" and there is no requirement that he shall prove his debt against the bankrupt's estate. It would seem that to deny a creditor the right to oppose the granting of a discharge because he had not proved his debt and then allow him to apply to the court which granted it to set it aside, at any time within two years, without proving such debt, would be grossly absurd.

If the narrow construction which has been contended for is to prevail and no effect is to be given to the 31st section of the present bankrupt act, it would seem that no one but a creditor who has proved his debt can oppose a bankrupt's discharge, as other persons in interest are not named in the act; and upon the same principles of construction it may well be contended that only such creditors as had proved their debts prior to the granting of the order to show cause, can be allowed to appear and make such opposition. I am satisfied that neither of these propositions can be maintained; and after the fullest consideration I have been able to give the whole subject, I am of the opinion that the construction given to the act of 1841 by Mr. Justice McLean and Chancellor Walworth, and not that given by Judge Betts in *King's case*, was the proper construction of that act; and that, under the

In re Alfred Beardsley.

31st section of the present bankrupt act, there is no sufficient reason for denying the right of the creditors, who have appeared in this case, to contest the discharge of the bankrupt, even if it be conceded that *King's case* was properly decided. They will therefore be recognized as having a proper standing in court for that purpose.

BUFFALO, *March* 31, 1868.

DISTRICT COURT, S. D. NEW YORK.

Where a bankrupt has charge of, and conducts in his own name, the business of another, taking half of the net profits as his compensation therefor: *Held*, that the right to his share of the net profits is not property to be reported as assets; and that there was no ground for refusing a discharge.

In re ALFRED BEARDSLEY.

BLATCHFORD, J. The petitioner set forth in his petition that he had no assets or property. His discharge is opposed by a creditor, who has filed eight specifications of the grounds of his opposition. Six of these have been heretofore held by this court not to be in proper form to be triable. The third and fifth alone are in issue. The third is that "said Beardsley had an interest in the property in, and the business conducted at the saloon at Liberty Street, city of New York, at the time of making and filing said petition, of the value of three thousand dollars, and the said business was and is carried on for his sole benefit." The fifth is, that "the business at said saloon is pretended to be conducted in the name of one Pope, but really for the benefit of said Beardsley, with intent to defraud said creditors." These specifications are quite loosely drawn, but taken together and in connection with the allegation in the petition that the bankrupt has no assets, they may be regarded as averring that the bankrupt has concealed his interest in the property at the saloon, with a view to defraud his creditors, and has been guilty of fraud in not delivering such property to his assignee, it having be-

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longed to him at the time he presented his petition and inventory. The evidence, however, falls entirely short of showing that the bankrupt had any interest in the property at the saloon, either the furniture or the lease of the premises. On the contrary the proof is satisfactory, that the lease and the furniture were bought from one Taylor by Pope on his own account and as his own property exclusively, under an arrangement whereby the bankrupt was to take charge of the business of the establishment and give it the use of his name, taking one half of the net profits as his compensation. This arrangement was made early in March, 1867. Pope paid \$3000, for the lease and furniture, giving \$2,000 in cash and his three notes amounting to \$1,000 in the aggregate. The notes were of two, four, and six months. Their several amounts are not stated, but it is assumed that each was for \$333.33. The name of the bankrupt was used over the saloon. The petition was filed June 12, 1867. Only one of these notes fell due before the petition was filed. That note and the two notes which fell due after the petition was filed, were paid out of the receipts of the saloon by the direction of Pope. It is claimed by the creditor that the payment, out of such receipts, of the note which fell due before the petition was filed, had the effect, inasmuch as the one half of the money (it being assumed that such money was net profits of the establishment) belonged to the bankrupt; to constitute the bankrupt, to the extent of the one half of the amount of such note, an owner in the property of the saloon. But this is not so. If the \$333.33 used to pay the note was net profits of the business, and if the one half of it, that is, \$166.66 belonged to the bankrupt, and was thus used to discharge a debt of Pope's with the knowledge and consent of Pope, the effect of the transaction would merely be to make Pope debtor to the bankrupt for the amount. It would not give to the bankrupt any ownership in the property for the purchase of which the note was given.

The allegation that the bankrupt had an interest in the business carried on at the saloon is true, although it is not

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true that it was not carried on for his sole benefit. But that interest was not property which he was bound to set forth in his inventory, unless it had resulted at the time in money or something tangible which he then possessed. The right to his share of the net profits was not property, any more than the right of a clerk who has a stated salary, to continue to receive such salary, is property, which he is bound to set forth in his inventory as a bankrupt. As to the allegation that the business at the saloon was pretended to be conducted in the name of Pope, but really for the benefit of the bankrupt with intent to defraud his creditors, the business seems to have been conducted, so far as the public could see, in the name of the bankrupt, his name being over the saloon. This would have led rather to the belief by the public and the creditors of the bankrupt, that the property at the saloon belonged to the bankrupt, when in fact it did not; and there was nothing in it calculated to defraud or showing any intent to defraud his creditors.

This disposes of the specifications. I have assumed that the note referred to was paid out of the net profits of the business.

Unless it was, then no part of the property of the bankrupt went towards paying it, and Pope did not become thereby a debtor to the bankrupt, so as to be his debtor at the time the petition was filed and make it incumbent on the bankrupt to set out such debt due from Pope as an asset in his inventory. But the only evidence is that the note was paid out of the receipts of the saloon. The creditor does not show that it was paid out of the net profits. It does not appear what was the state of the accounts between the bankrupt and Pope when the petition was filed. It is incumbent on the creditor to show that such debt from Pope existed as an asset. The bankrupt swears that he had no claims due him, that he knows of, at the time when he filed his petition. It is for the creditor to show that he had. These remarks are made as if there was an allegation in the specifications that the bankrupt had wilfully sworn falsely in the

In re Joseph Haughton.

oath to his inventory, in omitting his debt from Pope. But there is no such allegation.

The case is not a proper one for withholding a discharge and one will be granted whenever the register shall certify that the bankrupt has in all things conformed to his duty under the act, and has conformed to all the requirements of the act; except as in the particulars embraced in such specifications.

Edward James, for the bankrupt; *S. F. Higgins*, for the creditor.

U. S. DISTRICT COURT, NEW YORK.

Where a petition averred that acts were committed by bankrupt, in contemplation of bankruptcy and insolvency, and evidence of insolvency only was given, the petition should be amended accordingly.

In re JOSEPH HAUGHTON.

BLATCHFORD, J. The petition in this case was filed on the 20th of January, 1868. It alleges as acts of bankruptcy, that the debtor, on the 24th of December, 1867, at New York, being in contemplation of bankruptcy and insolvency, procured and suffered his property to be taken on legal process in favor of Nicholas Haughton, namely, upon an execution issued to the sheriff of the city and county of New York upon a judgment entered against him in the New York Supreme Court by Nicholas Haughton for \$913.92, with intent thereby to give a preference to Nicholas Haughton, and with the intent, by such disposition of his property, to defeat and delay the operation of the bankrupt act, and which judgment was entered up on an offer made by him on the 9th of December, 1867, to said Nicholas Haughton, to allow judgment to be entered against him for \$892 and costs, which offer was accepted by Nicholas Haughton on the 13th of December, 1867, and said judgment was thereupon entered on the 18th of December, 1867, in accordance with the pro-

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visions of the Code of Procedure of the State of New York, that the debtor, on the twenty-fourth of December, 1867, being in contemplation of bankruptcy and insolvency, procured and suffered his property to be taken on legal process in favor of Bernard Reilly, namely, upon an execution issued to the sheriff of the city and county of New York upon a judgment entered against him in the common pleas for the city of New York by said Reilly, for the sum of \$2,556.17, with intent thereby to give preference to said Reilly, and with the intent, by such disposition of his property, to defeat and delay the operation of the bankrupt act, and which judgment was entered against the debtor in an action brought by said Reilly in said court to recover the sum of \$2,000, interest, and costs, and in which action the debtor made no defence, and allowed, suffered, and permitted said judgment to be entered against him by default on the 5th of December, 1867.

The debtor having appeared in this court, under an order to show cause, on the 1st of February, 1868, and denied the act of bankruptcy alleged in the petition, and demanded a trial by the court, a reference was made to a commissioner of the circuit court, under section 38 of the act, to take testimony in regard to the matters alleged in the petition, and report the same to the court. Under this order of reference a large amount of testimony has been taken. Certified copies of the records of the two judgments have been introduced, and the testimony of two of the members of the firm of the petitioning creditors of Isaac Rosenthal, and Albert Cornell, creditors, of John Kelly the sheriff, and of Bernard Reilly and Nicholas * Haughton, the judgment creditors in the two judgments, has been taken. 122

The facts set forth in the petition are fully proved, and it satisfactorily appears therefrom that the debtor, being in contemplation of insolvency, and being in fact insolvent, did, at the time named in the petition, namely, on the 24th of December, 1867, suffer what amounted substantially to all the property he had, to be taken on executions issued on the

In re Darius Tallman.

judgments named in the petition, which were recovered in the manner set forth in the petition, with intent to give a preference to the judgment creditors. This is, under section 39 of the act, ground for an adjudication of bankruptcy; the other particulars required by that section to warrant an adjudication being shown to exist.

The petition alleges that the debtor committed the acts, "being in contemplation of bankruptcy and insolvency;" no proof is given that he was "in contemplation of bankruptcy" as the meaning of that term is held by this court. The creditors may amend their petition by striking out the words "being in contemplation of bankruptcy and insolvency" when they twice occur in the petition, and by inserting instead the words "being insolvent or in contemplation of insolvency." When this is done, an order of adjudication of bankruptcy will be entered.

G. A. Seizas, for the creditors; *Brown, Hall & Vanderpool*, for the debtor.

U. S. DISTRICT COURT, S. D. NEW YORK.

Evidence of fraud in the creation of a debt sought to be introduced by a creditor is inadmissible in proceedings in bankruptcy.

In re DARIUS TALLMAN.

COUNSEL for Joseph Hacker, one of the creditors, proposes to introduce witnesses to prove the nature of the transaction out of which his debt arose, and that the debt was contracted by fraud, for the purpose of showing that this debt cannot be discharged under these proceedings.

JAMES M. SMITH,
Attorney for Joseph Hacker.

April 1, 1868.

The bankrupt, Darius Tallman, objects that such inquiry is irrelevant; that the question cannot arise in these proceedings; that such a debt is not discharged, and can be collected

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notwithstanding such discharge; and that such question can only arise when it is undertaken to collect such debt after the discharge is granted.

WARREN G. BROWN,
Attorney for Bankrupt.

It is conceded that the debt referred to, and the fraud alleged by the creditor, was so contracted, and that the alleged fraud took place in the year 1864, and that the debt is in judgment.

WARREN G. BROWN,
Attorney for Bankrupt.
JAMES M. SMITH,
Attorney for Creditor.

April 1, 1868.

Southern District of New York, ss.: I, Isaac Dayton, one of the registers in said court of bankruptcy, do hereby certify that, in the course of the proceedings in said cause before me, the foregoing question arose before me pertinent to the said proceedings and was stated, and agreed to, by the counsel for the opposing parties, as hereinbefore set forth, and the said parties requested that the same should be certified to the judge for his opinion thereon.

ISAAC DAYTON, *Register.*

Dated 6th April, 1868.

OPINION OF THE REGISTER.

The 33d section of the bankrupt act declares "that no debt created by the fraud of the bankrupt shall be discharged under the act, but the debt may be proved and the dividend thereon shall be a payment on account of the said debt." The fact that the debt was created by fraud does not therefore constitute a ground of opposition to the discharge of the bankrupt; and as the examination of the bankrupt is for the purpose of ascertaining whether or not the bankrupt is entitled to a discharge under the act, evidence of fraud in the creation of the debt is not admissible.

ISAAC DAYTON, *Register.*

NEW YORK, 6th April, 1868.

In re Owen Byrne.

BLATCHFORD, J. The register is correct in his view.

The clerk will certify this decision to the register, Isaac Dayton, Esq.

April 8, 1868.

U. S. DISTRICT COURT, W D. PENNSYLVANIA.

A *bonâ fide* transfer of partnership effects by one member of the partnership to another vests the title in the transferee as his separate estate.

Where there are both joint and separate debts, proved in a bankruptcy on a separate petition, the joint creditors are not entitled to participate in the distribution of the assets until the separate creditors are paid in full.

The exception allowing joint creditors to receive dividends *pari passu* with the separate creditors, in cases where there is no joint estate, and no solvent partner, is inoperative under the bankrupt law of 1867.

A. transferred his interest in partnership effects to his copartner B., on the 2d of October, on his (B.'s) promise to pay the firm debts, without buying any new stock or making any effort to continue the business. B. filed his petition in bankruptcy on the 7th of October; *held* that the transfer was accepted by B. in contemplation of filing his petition in bankruptcy, and that the transfer was void as a fraud on the creditors of the partnership.

In re OWEN BYRNE.

I, Samuel Harper, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated, and agreed to, by the counsel for the opposing parties, to wit, Mr. John M. Kennedy, who appeared for John M. Little, a separate creditor of the bankrupt, and Mr. Alexander H. Miller, who appeared for E. Morris & Co., and others, joint creditors of the firm of Graham & Byrne, of which the bankrupt was a member, and who agreed upon the following facts, namely:

Owen Byrne, the bankrupt, entered into copartnership with W. P. Graham, on the 22d of February, 1867, for the purpose of carrying on the hat, cap, and fur business in the city of Pittsburg. On the 2d day of October, 1867, the firm was formally dissolved, Graham giving to Byrne "entire possession of the store, fixtures and goods, and debts due the

In re Owen Byrne.

concern," and Byrne agreeing "to pay all the debts and liabilities of the concern and save Graham harmless from liability therefrom."

Five days afterwards, to wit, on the 7th day of October, Byrne filed his petition for adjudication in bankruptcy. In the mean time, no new stock had been purchased, nor had Byrne made any effort to continue the business.

Byrne was at the same time carrying on a separate trade, as a merchant tailor, in another part of the city.

In his inventory of assets, Byrne set out the stock formerly belonging to the partnership separately from the stock of tailor's goods. He also set out book accounts due to the partnership amounting to \$136.85.

The assignee has realized as follows: On the partnership stock, \$1,179.87; on the partnership debts, \$3.50; on the separate stock, \$1,337.11; and on the separate debts, \$93.75. There is yet some separate real estate undisposed of.

William P. Graham, the other member of the partnership, has also filed his petition and been adjudicated a bankrupt by this court, so that there is no solvent partner.

It is contended by Mr. Kennedy that by the dissolution of the firm of Graham & Byrne the stock of hats, caps, and furs, became the separate estate of Byrne, and that in the distribution of the funds in the hands of the assignee, the joint creditors cannot participate until the separate creditors have been paid in full.

Mr. Miller contended that all the assets in the hands of the assignee must be distributed among all the creditors, joint and separate, *pro rata*, without priority or preference, as provided in section 27 of the bankrupt law; that the 36th section does not apply to this case, as it has reference exclusively to the bankruptcy of partnerships existing at the time of the presentation of the petition in bankruptcy, and that the whole spirit and meaning of the bankrupt law is against preferences. He further contended that if the court be of the opinion that the joint creditors cannot participate with the separate in the distribution of the separate estate, that the circum-

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stance of the filing of the petition so soon after the dissolution, must render the transfer of the partnership property to the sole possession of Byrne void as a fraud on the joint creditors.

The following questions are submitted, namely :

First. Does the transfer of partnership property by one partner to another change the character of the property from joint to separate ?

Second. Can the joint creditors share equally with separate creditors in the distribution of the assets of one member of a firm on a separate petition ?

Third. Is the assignment by Graham to Byrne void as a fraud upon the joint creditors ?

First. The first question has been frequently adjudicated in England and in this country, and it is well settled that a *bonâ fide* sale for valuable consideration, by one partner to another, of all the partnership effects, vests the sole title in the latter as his separate estate. Story on Part. 358, 372, and authorities there cited ; Hilliard on Bank. and Ins. 64, and cases cited ; *Robo v. Mudge*, 14 Gray, 504 ; *Howe v. Lawrence*, 9 Cush. 553 ; *Ensign v. Briggs*, 6 Gray 329. This has been held even when the firm and both partners were at the time insolvent, more especially if the partners have no knowledge of such insolvency ; and in some cases it has been ruled that even this knowledge would not avoid the transfer. *Howe v. Lawrence*, 9 Cush. 553 ; *Peake ex parte*, 1 Madd. 346.

Second. The principle involved in the second question has been liable to great fluctuation. As early as the time of Lord Chancellor Hardwicke, it was held that joint creditors might be admitted to prove under separate commissions for the purpose of assenting to or dissenting from the discharge, but not to receive until after the separate creditors were paid in full. Chancellor Kent, in *Murray v. Murray*, 5 John. Ch, 73-77, traces the course of the English equity decisions upon this point, and thought that the rule just stated was just and reasonable, while Judge Story, in his work on Partnership, at section 382, says that " it rests on a foundation as question-

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able and unsatisfactory as any rule in the whole system of our jurisprudence," although he says it is for the public peace that it should be left undisturbed.

The rule, however, has been subject to three exceptions. *First*, where a joint creditor is the petitioning creditor under a separate fiat; *second*, where there is no joint estate and no solvent partner; *third*, where there are no separate debts.

The facts agreed upon by the parties to this certificate show that there is no solvent partner, but it is not agreed that there is no joint estate. At the date of the dissolution there were debts due the firm of Graham & Byrne amounting to \$136.85, and although they were embraced in the assignment yet it has been held that such debts will remain in the order and disposition of the partnership, and form part of the joint estate, unless, *prior to the bankruptcy*, notice of the assignment * has been given to the debtors. 123 Story on Part. sec. 403. Public notice in the Gazette was held to be insufficient, and that the debts owing by those debtors who had not express notice remained in the partnership. *Ex parte Osborne*, 4 Glyn & Jam. 358. As the filing of the petition followed so closely after the dissolution, it is not unreasonable to hold that the debtors of the firm had not received express notice prior to the bankruptcy. These debts, then, will constitute a joint estate, to which the joint creditors must resort, and leave the separate estate of the bankrupt to the separate creditors, as provided by the 36th section of the present bankrupt law. If there be any joint fund, however small, the assets are to be marshalled according to the partnership rule, although the fund may have been created by the separate creditors purchasing some of the partnership assets, actually worthless, for the purpose of creating it. *In re Marwick*, Davies, 229. Where there was a joint estate to the amount of £13 it was held that the joint creditors could not receive dividends from the separate estate until all the separate creditors could be paid in full, although it did not appear that after costs, any amount of the £13 would remain for distribution. *Ex parte Kennedy*, 19 Eng. Law & Eq.

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150. Five shillings has been held sufficient joint estate for this purpose.

But whether these debts are joint estate or not, it seems that joint creditors are not entitled to dividends until the separate creditors are paid in full. It is said that where an insolvency statute adopts, in terms, the general rule (as is the case in section 36 of the present bankrupt law), it is not only rigidly applied, conformably to the practice in England, but the exception to the rule already stated is held to be impliedly abrogated. Hilliard on Bank. and Insolvency, 69. In *Howe v. Lawrence*, 9 Cush. 559, Bigelow, J., said: "The statute recognizes no such exception. The rule is direct and peremptory. This provision was reported and enacted with a full knowledge of the exception. The rule may sometimes operate harshly; but it is definite, clear, and easily applied. The exceptions to it are artificial and refined, leading to nice and subtle distinctions, and sometimes operating with great inequality and injustice. Under such circumstances we are unwilling to adopt it into our jurisprudence." See, also, *Somerset v. Minot*, 10 Cush. 597. These decisions were under the insolvent laws of Massachusetts, which contain almost identically the same provisions in regard to this rule as the present bankrupt law, and are good authorities upon this question.

I am unable to see what bearing the provisions of the 27th section have upon this question. They do, it is true, prohibit preferences among creditors — the very essence of the bankruptcy system; but the 36th section enacts, in terms, the partnership rule, and the two sections must be taken together. When there is a joint fund, the joint creditors take it, and when there is a separate fund the separate creditors take it; and the 27th section merely provides, that, when the creditors who are entitled to share in the distribution have been determined, they shall take *pro rata*. Prohibiting the joint creditors from sharing in the separate estate, or the contrary, is not a preference in favor of the separate or joint creditors, as the case may be, denied by law, but an equitable rule which the courts are to administer under the direction of the law.

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I had written thus far when my attention was drawn to a decision upon this question in the district court for the Northern District of Illinois, *In re Jewett*, reported in the American Law Register for March, page 291.¹ The syllabus is as follows :

“Where there are both individual and partnership creditors of a bankrupt, but the assets are individual only, though mainly consisting of goods purchased by the bankrupt from the partnership on its dissolution prior to the bankruptcy, and being principally the same goods, in the purchase of which the partnership debts had originated; the partnership creditors will be entitled to be paid *pari passu* with the individual creditors.”

This decision does not, it seems to me, rest on the reason either of the rule or the exception. It did not appear that there was not a solvent partner and joint estate, and the register ruled that inasmuch as the separate creditors did not prove that there was a solvent partner and joint estate, the joint creditors were entitled to dividends *pari passu* with the separate creditors. I submit, as better reasoning, that the burden of proof was on the joint creditors to establish the facts necessary to make the exception operative, as they sought to avoid a well settled rule of law and equity. But the register has overlooked the American decisions upon this question which I have cited, and it seems clear that the weight of authority preponderates greatly against his decision. I can perceive nothing in his opinion to warrant me in modifying the views which I have expressed.

Third. To pass the title to partnership property to one member of the firm, the transaction must be *bona fide*. If there be want of good faith sufficient to raise a presumption of fraud, equity will declare the assignment void. It has already been seen that insolvency of the firm, and the members of it, and even a knowledge of such insolvency by the partners, will not make the transaction void. The circumstances of this case, however, are peculiar, and, so far as the law of bankruptcy is concerned, I have not been able to find

¹ N. B. R. vol. i. p. 130, *quarto*.

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a parallel to it in the books. But five days intervened between the dissolution and the filing of the petition, and one was a Sunday. Allowing a reasonable time for the preparation of the petition and schedules, the conclusion is almost irresistible that the bankrupt had in contemplation the filing of his petition at the very time he accepted the transfer of the partnership property. Surely this consideration is sufficient to make the assignment void as to the joint creditors, and to return the proceeds arising from the sale of the stock of hats, caps, and furs to the order and disposition of the partnership as joint estate.

The first and third questions are decided in the affirmative, and the second in the negative, and the assignee is directed to prepare separate accounts to be presented by him at the adjourned second meeting.

And the said parties requested that the same should be certified to the judge for his opinion thereon.

Dated at Pittsburg, the 1st day of April, A. D. 1868.

SAMUEL HARPER, *Register.*

The register is clearly right upon the several points presented, and his decision is affirmed.

WILSON M'CANDLESS,
U. S. District Judge.

U. S. DISTRICT COURT, S. D. OHIO.

The reservation of a greater rate of interest than six per cent by a national bank, or discounting a promissory note, does not render the debt for the principal thereof, one not provable in bankruptcy.

In re ADDISON MOORE, *ex parte* THE NATIONAL EXCHANGE BANK OF COLUMBUS.

LEAVITT, J. The petition alleges that the National Exchange Bank of Columbus is a creditor of Addison Moore in a sum exceeding \$300, upon a liability created by his indorsement of a promissory note given to said bank by one

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W. W. Moore, payable to the order of said Addison Moore, three months after the 1st of June, 1867, which was not paid at maturity, though payment was duly demanded and the indorser notified of the non-payment. The petitioner then avers several acts of bankruptcy in making payments and transfers of property to certain creditors, with a knowledge of his insolvency, and with intent to prefer them. The prayer of the petition is, that for these acts the said Moore may be declared a bankrupt, pursuant to the act of congress approved the 2d of March, 1867.

The alleged bankrupt, having been duly notified of the time and place of hearing, has appeared by counsel, and has filed his answer to the allegations of the petition charging the acts of bankruptcy; and also averring that the debt, claimed as due to the said bank, is not a demand provable under the bankrupt act, and that the promissory note indorsed by him is a nullity, for the reason that, in its discount by the bank, interest was reserved and paid at a higher rate than six per cent. per annum.

The legality and provability of the petitioner's debt precludes the question whether the alleged acts of bankruptcy have been committed, and must, therefore, first require the consideration of the court. The bankrupt act in terms, makes it necessary that the petitioning creditor should allege and prove a valid and legal demand against the person proceeded against as a bankrupt; and it is obvious, therefore, if this exception is sustained, he has no standing in court, and his petition must be dismissed, unless some other creditor shall choose to prosecute as the petitioner.

It is admitted by the counsel for Moore, that the petitioning creditor, the National Exchange Bank of Columbus, is a banking institution, legally organized and doing business as such, under the authority of the national banking law of the 3d of June, 1864. It is also admitted by the counsel for the bank, that the note described was discounted by that institution, and that interest on the same, charged and reserved, was at the rate of ten per cent. per annum. And it is insisted

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that the interest so charged and reserved, being in excess of six per cent. per annum, is usurious, and its discount beyond the corporate power of the bank; and, therefore, that the note indorsed by said Moore is void and cannot be viewed as creating a valid debt, provable under the bankrupt act.

The question thus presented involves the construction of the provisions of the national banking act, prescribing the rate of interest which banks organized under it may charge and reserve, and the legal effect of charging and receiving a higher rate than that limited by the act. The court has no information that this question has been judicially decided, as arising under the law referred to, and is, therefore, without any precedent to aid it in reaching a conclusion. That it is one of great practical importance, and not free from doubt, may be readily conceded. Regretting that the pressure of other duties has not permitted a more thorough investigation of the point, I will proceed to state the views I entertain.

The 30th section of the national banking act provides, "that any banking association may take, receive, reserve, and charge, on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located and no more, except that where by the laws of the state or territory a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state under this act. And where no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve, and charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged to be a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person, or persons, paying the same,

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* or their legal representatives, may recover back, in 124 any action of debt, twice the amount of interest thus paid from the association receiving the same."

The question arising under this provision of the banking law of the United States, has been fully and ably argued by the counsel on both sides, and numerous authorities have been cited. On the one hand it is insisted, that, as by the law of Ohio, six per cent. per annum is established as the legal rate of interest, the reservation of a higher rate by a national bank is an excess of its corporate power, and usurious in its character; and that the writing or evidence of debt on which interest is thus reserved or paid is a nullity, and can have no legal force. On the other hand, it is contended that although such reservation of interest is in conflict with the statute, and therefore illegal, the statute has affixed a penalty for the illegal act, not the forfeiture of the principal debt, but of the entire interest illegally reserved, with the right to the party paying it to recover, by suit against the bank, double the sum of the interest paid.

The cases cited by the counsel, urging this exception to the demand of the petitioning creditor, are harmonious in holding that a contract or agreement against public policy, or founded upon an immoral consideration, or in conflict with an explicit statutory provision, is invalid, and cannot be enforced in a court of justice. It is undoubtedly a sound legal principle that courts will not lend their aid to enforce contracts or transactions, to which such objections apply. But it occurs to the court, that the point presented in this case is not fully met by the cases cited. This court is called upon to give a construction to the section of the national banking law which has been quoted. And the rule of interpretation is to ascertain from the whole section what was the intention of the legislature in enacting it. In prescribing a rate of interest legally chargeable, and declaring an excess of such rate to be illegal, was it intended that the contract should be an entire nullity, and the principal, with twice the amount of interest charged, be forfeited? Or was it intended that the

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forfeiture of double the interest charged should be the penalty for the illegal act, without invalidating the right of the bank to enforce the payment of the principal debt? It was clearly within the legislative power to have declared that the penalty for charging or receiving illegal interest, should be the forfeiture of both principal and twice the amount of interest. But if this had been intended, would not such an intention have been expressed in explicit language?

There is no reason to doubt that if the section referred to had stopped with the prohibition of taking or receiving interest in excess of the rate prescribed, a loan made by a bank in conflict with such prohibition could not be enforced. It would unquestionably be held to be an illegal and void act. But the legislature has chosen to prescribe a specific penalty for the illegal act, namely, the forfeiture of double the sum of the entire interest charged or paid, and have not declared that the principal debt should be forfeited. It is certainly not reasonable to infer that it was the intention of congress to provide a double penalty for the illegal reservation on loans. Yet such would be the effect of the construction of the section referred to, as insisted on by the counsel for the alleged bankrupt. So far as the court is advised, there is no law in any of the states of the Union on the subject of usurious interest, which provides for the forfeiture of the entire debt on which such interest has been charged and paid, together with the interest, and a liability on the part of the creditors to pay twice the amount of the interest to the debtor. I am therefore led to the conclusion that, by a fair implication, it was not intended by congress, in the enactment of the section referred to, to punish a bank for reserving interest in excess of the statute, by the forfeiture, not only of the principal debt, but double the interest charged or received. It was held by the supreme court of the United States, in the case of the *United States v. Babbitt*, 1 Black R. 61, that "what is implied in a statute, pleading, contract, or will, is as much a part of it as if it were expressed." From the provision of the 13th section, it would seem to be fairly

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implied, that while the specific forfeiture named is enforceable, the transaction as to the principal debt is not invalidated.

This view, in my judgment, violates no principle of sound morality, or of public policy. It was clearly competent for the congress of the United States, in the creation of the national banking system, to visit the banks with a severe penalty for taking excessive interest without a forfeiture of the debt. In this age of commercial enterprise and activity, many solvent and perfectly responsible persons find that they can make profit by borrowing money at a rate of interest above the legal standard. If the rate charged is not so high as to be unconscionable and oppressive, no wrong is perpetrated on the borrower, and no just reason is perceived for absolving him from his liability to pay the principal debt, unless the legislative will to that effect is clearly expressed. It may be right and expedient that proper guards should be provided by law against extortionate charges for the loan of money. Usury, in its odious sense, is immoral and reprehensible; but if one voluntarily borrows money from a bank or an individual, and, in good faith, promises payment, with interest beyond the legal rate, there is no justice in visiting upon the lender the forfeiture, not only of the debt, but subjecting him to a liability at the suit of the borrower, to double the amount of interest charged. If there is culpability in such a transaction, both parties are equally implicated; but the construction of the statute insisted upon, places it in the power of the borrower, not only to relieve himself from the entire debt, but to make dishonorable gain by suing for and recovering double the amount of interest reserved. In the absence of any clear statutory provision for this purpose, I am unwilling to sanction such a construction of the section of the law referred to as will lead to the results indicated.

There is high judicial authority for the doctrine that an act may be unlawful as within the prohibition of a statute, and yet a debt or obligation growing out of the act be valid, unless it appears by a fair construction of the statute that it was the intention of the legislature that it should be void.

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The case of *Harris v. Runnells*, 12 Howard S. C. R. 79, seems to be directly in point on this proposition. The defendant was sued on a promissory note, the consideration of which was the price of certain slaves taken to the State of Mississippi, in violation of a law of that state. Upon the question whether the note was void, the court held that the intention of the legislature as to the validity of the note must be decisive of the question. In their opinion the court say: "Whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, it is not to be taken for granted that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice." And further, "it is true that a statute containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent and contains nothing from which the contrary can be inferred, a contract in contravention of it is void. It is not necessary, however, that the reverse of that should be expressed in terms to exempt a contract from the rule. The exemption may be inferred from those rules of interpretation to which, from the nature of legislation, all of it is liable when subjected to judicial scrutiny. That legislators do not think the rule one of universal obligation, or that, upon grounds of public policy, it should always be applied, is very certain. For in some statutes, it is said in terms that such contracts are void; in others, that they are not so. In one statute, there is no prohibition expressed, and only a penalty; in another there is prohibition and penalty, in some of which contracts in violation of them are void or not, according to the subject matter and object of the statute; and there are other statutes in which there are penalties and prohibitions, in which contracts made in contravention of them will not be void, unless one of the parties to them practises a fraud upon the ignorance of the other. It must be obvious, from such

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diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined, before courts should refuse to give aid to enforce contracts in contravention of them."

The case cited seems strongly to sustain the principle that unless it is clear from the words of a prohibitory statute, that an agreement in violation of it is void, the courts will not so declare it, but will give effect to the agreement. The intention of the legislature is to be made out by referring to the whole statute, and such intention will control the courts in giving it a construction. And, as before remarked, there being nothing in the national banking act from which an intention to invalidate a contract by which illegal interest is reserved, is fairly implied, and there being ground for the presumption from the specific penalty provided, that such effect was not intended, I am led to the conclusion that the note in question is not void, and must be recognized as a provable debt under the bankrupt law.

The case of the *Bank of the United States v. Owens et al.* 2 Peters R. 527, is cited by counsel as sustaining the doctrine that all contracts prohibited by law are unconditionally void, and not to be enforced, even if there is no express provision declaring their nullity. The principle held in that case is, however, explained and modified by the later case of *Harris v. Runnells*, before referred to. And it may be remarked that the facts in the case in 2d Peters were of a character requiring the most stringent application of law, to secure the ends of justice. There was a flagrant and oppressive usury on the part of the bank, as well as a clear violation of its charter. The interest reserved, as stated in the opinion of the court, was equivalent to forty-five per cent. for three years, being about fifteen per cent. per annum in excess of the legal interest. Every instinct of justice required that relief from this hardship should be afforded the injured party. But the case before this court does not present any of the repulsive features of the case referred to. It involves no moral turpitude, vitiating the contract on general prin-

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ciples. It is simply the case of a voluntary indorsement of a promissory note, in the discount of which interest was reserved at the rate of ten per cent. per annum. There is no pretence that any unjust advantage was taken of the necessities of the borrower, or that anything transpired which would shock the conscience of the most upright person. If, therefore, the note in question is void, it must be because the statute makes it so, and not on the general principles of the common law.

It is insisted, however, by the counsel for the alleged bankrupt, that the discounting the note in question, with a reservation of illegal interest, was beyond the corporate power of the bank, and implies an excess of authority which invalidates the notes. It is, doubtless, true as a general principle, that every corporation must adhere strictly to the law of its creation, and can exercise no power not expressly granted or necessarily implied. But the cases are numerous to

125 the * effect, that where a banking institution is vested, by its charter, with authority to make loans by the discount of paper, its legal rights and responsibilities as to such a transaction are the same as those applicable to private persons. The laws of all the states of the Union prescribe the rate of interest which may be charged in the ordinary transactions of life, and affix a penalty for any excess beyond the rates fixed. But the same rule applies to such transactions as applies to corporations deriving their authority from their charters. In this respect there seems to be no difference between natural persons and corporations. This principle was fully discussed and settled in two cases, to which the attention of the court has been called, after full consideration. The cases referred to are the *Farmers' Bank v. Burchard*, 33 Vermont Rep. 346, and the *Bank of Manchester v. Nolan et al.* 7 Howard's Miss. Rep. 508. These cases, with many others that might be cited, distinctly hold that where a bank reserves illegal interest in its loans, unless its charter expressly declares that the contract of loan shall be void, it is void only as to the excess of interest charged, and not as to the principal. And it may not be inaptly

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noticed that this is the spirit of nearly all the modern legislation of the states on this subject. With few exceptions, the forfeiture of the illegal interest, or the whole of the interest reserved, is the penalty declared. And can it be reasonably doubted that the congress of the United States, in the enactment of the 30th section of the national banking law, intended the same result, but superadding to the forfeiture of the entire interest, and as a further penalty, a liability to pay twice the sum of the entire interest reserved.

The counsel for Moore have referred to the 9th and 15th sections of the national banking law, as showing the excess of the corporate power of the bank in discounting the note in question at the rate of ten per cent. per annum. The 9th section requires each director of a national bank to take an oath that he will not knowingly violate, or willingly permit to be violated, any of the provisions of the act. And the 53d section provides that the knowingly violating, or permitting the violation of any of the provisions of the act by a director, shall be a ground of forfeiture of all the rights and franchises granted, to be adjudged by a court of the United States in a suit for that purpose, prosecuted by the comptroller of the currency.

These are doubtless wise and just provisions to secure the faithful performance of the duties of directors. If complaint is made against them under the provisions of the 53d section, in the manner prescribed, the corporation is subject to forfeiture of all its rights and franchises, upon a proper adjudication by a court of the United States. But it is not perceived that this provision can affect the construction of the 30th section, fixing the rate of interest which may be charged, and the penalty for charging a rate in excess of that prescribed. The illegal interest is made a ground for the forfeiture of the charter, but it does not follow that a contract of loan by which illegal interest is reserved, shall be void as to the principal debt, or that as between the parties to the transaction any other result would follow beyond the liability of the bank to forfeit twice the sum of interest received. On

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this subject the remark of Judge Story, in the case of *Fletcher v. The Bank of the United States*, 8 Wheaton, 388, seems directly in point. That learned judge, delivering the opinion of the court, says: "The taking of interest by the bank beyond the sum authorized by the charter, would doubtless be a violation of its charter for which a remedy might be applied by the government; but as the act of congress (the charter of the bank) does not declare that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery."

In closing this opinion, I may remark that the pressure of other duties has prevented me from noticing in detail the several cases cited by the counsel for Moore, to sustain the exception to the debt of the petitioning creditor. It did not seem to the court necessary that this should be done. The cases cited from the Ohio reports, and the reports of courts in other states, have no direct application to the questions before this court. The decisions referred to were based on state statutes, the language of which, in relation to the reservation of illegal interest, was not, in terms, or substantially, the same as that used in the national banking act, under which the present question arises.

In reaching the conclusion indicated, namely: that the debt of the National Exchange Bank of Columbus, so far as the principal is concerned, was not intended to be invalidated by the 30th section of the national banking law, and is a debt provable under the bankrupt act, candor requires me to say that I am not altogether free from doubt. The question, as it bears upon the present proceeding, is not important to the parties. Under the bankrupt law, if the debt of the petitioning creditor is not valid, any other creditor may, by leave of the court, be made a party to the proceeding, and the petition may be brought to a final hearing on the merits. But in reference to the banking and commercial interests of the community the question is one of vast practical importance. And doubtless it will soon be raised before other courts, and will be definitely settled by the court of the last resort. It

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will not greatly surprise me, nor will it be a source of any mortification if the question should be finally settled adversely to the views I have presented.

The exception to the petition is overruled, and the case will be heard on the facts which it alleges.

U. S. DISTRICT COURT, LOUISIANA.

The jurisdiction of the United States district courts sitting as courts of bankruptcy is superior and exclusive in all matters arising under the bankrupt act. The United States district court for Louisiana has judicial power to authorize the sale, by the assignees, of real estate surrendered by bankrupts, free and discharged of all debts secured by mortgage thereon.

In re R. H. BARROW ; Re LOEB, SIMON & Co. ; Re W. D. WINTER.

DURELL, J. The assignees of the bankrupts have, in the above entitled cases, filed petitions praying for orders authorizing the sale of real estate surrendered by the bankrupts, free and discharged of all debts secured by mortgage thereon ; thus transferring the security of the mortgage creditor and his right to priority of payment from the land to the proceeds of its sale. The judicial power of the court to issue orders in conformance with the prayers of the petitioners is called in question.

The jurisdiction of a district court of the United States sitting as a court of bankruptcy, is superior and exclusive in all matters arising under the statute. The estate surrendered is placed in the custody of the court so sitting in bankruptcy, and the officer appointed to manage it is accountable to the court appointing him, and to that court alone. No court of an independent state jurisdiction can withdraw the property surrendered, nor determine, in any degree, the manner of its disposition. These principles have been settled in cases which have declared the relations existing between federal and state jurisdictions. *Taylor v. Carryl*, 20 Howard, 583.

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The court being possessed of jurisdiction over the bankrupt's estate, and entitled to its exclusive administration, this question arises: How far does the power of administration extend? Does it extend to a suspension of proceedings taken for the purpose of subjecting portions of the estate surrendered to a sale under state process?

The answer to this question is to be found in the general powers conferred upon the court.

Until sale is made, the bankrupt is not divested of his interest in the property under seizure.

The assignee, appointed before sale is made, acquires the bankrupt's interest, and he acquires it for the general benefit of the creditors.

The interest of creditors in a suit wherein property is seized, is represented by the debtor, who has a standing in court and a power to intervene at any stage of the proceedings of the case. But by bankruptcy a new class of rights and interests are created, and each and every creditor has, through the assignee, a direct claim upon the estate. To permit a single creditor to follow his personal claim without reference to the common interest, might work great injustice.

The debtor, by his bankruptcy, is made incompetent to act. The law strips him of his property by a summary decree, and assumes the administration of his effects. It is in the nature of a bankrupt act to deal potentially (for the good of a class) with private and personal interests, and to uphold a general and just policy.

The bankrupt act of 1867 undertakes to establish a uniform system of bankruptcy. Without such uniformity the bankrupt could receive but a partial relief; for the insolvent laws of a state operate effectively only upon creditors residing within, and upon property being within the state of the insolvent's residence. *Baldwin v. Hale*, 1 Wallace, 223. A bankrupt law, operating upon creditors wherever resident throughout the Union, must have a perfect control over all the property of the bankrupt in order to fulfil its purposes. A creditor residing without the state in which the bankrupt

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resides, is brought involuntarily into a court of the United States, sitting as a court of bankruptcy, and a decree of that court discharging the bankrupt, binds the creditor. It is due, then, to the creditor, that the court should collect all the assets, adjust and liquidate all the incumbrances, and dispose of and distribute all of the effects of the bankrupt. And such are the powers given to the district courts of the United States, under and by virtue of the bankrupt act.

In the case of *Ex parte Christie*, 3 H. 221, the supreme court says: "Prompt and ready action, without heavy charges or expenses, could be safely relied on when the whole jurisdiction was confined to a single court, in the collection of the assets; in the ascertainment and liquidation of the liens, and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshalling the different funds and assets; in directing the sales at such time and in such manner as should best subserve the interests of all concerned; in preventing, by injunction or otherwise, any particular creditor from obtaining an unjust and inequitable preference over the general creditors by an improper use of his rights and remedies in the state tribunals; and finally, in making a due distribution of the assets, and bringing to a close within a reasonable time, the whole proceedings in bankruptcy." The first section of the bankrupt act of 1867 is but a repetition of a portion of this extract from the opinion of the supreme court; and the whole of it is to be found in the act. The act says that the court has the entire direction of sales to be made and of accounts to be rendered; that it has full power and authority to compel obedience to all orders and decrees made by it in bankruptcy, by process, to the same extent that the circuit courts have in any suit pending in equity. Such being the origin of the law, the court must suppose that the expositions of the opinion upon which it is based have been recognized as correct.

* The estate of the mortgagee, at common law, is a 126 fee simple estate. A tender after the law day does not discharge a mortgage; a reconveyance is necessary. The

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mortgagee cannot be required to do anything in equity, other than submit to redemption. This right of redemption is, in equity, inherent in a mortgage. "Once a mortgage, always a mortgage." But no such qualities attach to, or are inherent in, a mortgage in Louisiana. Here the mortgagee is not entitled to possession; cannot claim profits until after seizure, and instead of foreclosure can only sell. After insolvency in Louisiana, the syndic sells, and all that the mortgagee can ask for is that the sale may be a sale for cash. The bankrupt does not, therefore, in Louisiana, impair any of those vested rights which in England and in America have a constitutional protection. It is not important in these cases to consider how far, in other states, vested rights are under the dominion of a bankrupt law; it is sufficient to know that in Louisiana a sale of the land is all that the mortgagee bargains for, and such sale is secured by the bankrupt act as fully as by the laws of the state. The bankrupt act places in the court a discretion to fix the time and place of sale; and precisely this discretion exists in the insolvent system of Louisiana. It has never been controverted as unconstitutional, and if not unconstitutional, congress may confer it.

The same power is conferred upon the bankrupt court of France, to be exerted after the concordat is settled among the creditors, and a syndic is appointed; and the same power is conferred upon the bankrupt court of England, to be exerted in all cases of liens except those that convey a right in the land itself — a *jus in re*.

The people of the thirteen original states, when they created the present general government, gave to congress the power to establish uniform laws on the subject of bankruptcies throughout the United States; and when congress put in execution that power, all the state insolvent laws became necessarily silent, and the property of the bankrupt, even to the shadow of an interest in any estate whatsoever, was thereby subjected to the dominion of the courts of the United States.

Orders will, therefore, be made and issued in conformity with the prayers of the petitioners.

Alexander T. Stewart v. Siegfried Isidor *et al.*

U. S. DISTRICT COURT, NEW JERSEY.

Where it is shown that an assignee, chosen by the creditors, resides out of the district in which proceedings are being carried on, the court will not confirm the choice.

In re JAMES W. HAVENS.

THE creditors of the said bankrupt having on the 7th of April last chosen James Newton, of Middletown, New York, as assignee, Mr. Register Johnson refused to confirm the choice, on the ground that the assignee resided out of the district and was beyond the reach of process of the court, and referred the matter to the court.

FIELD, J. For the reasons stated by the register, the choice of assignee is not approved. The assignee must reside in the district in which proceedings are being carried on.

COURT OF COMMON PLEAS, CITY AND COUNTY OF NEW YORK, SPECIAL TERM.

The lien acquired by the commencement of a creditor's suit to reach equitable interests and things in action, should not be regarded as attaching by the mere commencement of the suit, but only when judgment is obtained; otherwise, a creditor claiming such a lien, under proceedings commenced before the enactment of the national bankrupt law, must disclose such proceedings and lien in proving his claim in a court of bankruptcy, and if he do not he thereby waives the lien.

Leave to defendants, to interpose a supplemental answer, setting up a discharge in bankruptcy, must be granted when it does not appear that the plaintiffs had disclosed their claim of lien in proving their debt in bankruptcy.

ALEXANDER T. STEWART v. SIEGFRIED ISIDOR *et al.*

BARRETT, J. In the case of *Goodwin v. Sharkey*, decided on the 17th inst., I held that property which had been conveyed by a bankrupt, in fraud of his creditors, prior to the passage of the bankrupt law, became vested in the assignee in bankruptcy by the force of that act, and by virtue of the pro-

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ceedings thereunder. The question now arises as to the effect of these proceedings upon a judgment creditor's suit, commenced before the passage of the act, for the purpose of setting aside conveyances alleged to be fraudulent, and of reaching the property transferred thereby.

The facts are these: On the 20th of September, 1866, the plaintiffs recovered a judgment in the superior court of this city against the defendants, Siegfried Isidor and Julius Blumenthal, for the sum of \$730.42. Shortly prior thereto these defendants made an assignment of their property to the defendant Moritz Isidor. Execution having been issued upon that judgment and returned unsatisfied, this suit was commenced on the 30th of October, 1868. The complaint charges fraud in the making of the assignment, and seeks to set it aside and obtain the application of the property so conveyed to the payment of the judgment. Issue was joined, and the cause has since remained untried upon the equity calendar of this court. On the 10th day of February, 1868, the judgment debtors, Siegfried Isidor and Blumenthal, obtained their discharge in bankruptcy from the district court of the United States for the Southern District of New York; and it appears that in the proceedings which resulted in that discharge the plaintiffs appeared, proved their claim, and opposed the discharge. It does not appear whether the plaintiffs, in proving their debt, referred to the present suit, or to the lien which they claim to have acquired thereby. A motion is now made for leave to file a supplemental answer setting up these facts, and it is resisted solely upon the ground that the discharges in bankruptcy are no bar to the present action. The discussion having been solely upon the merits of the proposed defence, it is proper that the effect of the discharges should now be considered.

The weight of authority in this state would seem, upon a casual examination, to favor the position that the mere commencement of an action in the nature of a creditor's bill gives to the creditor an equitable lien upon the property and things in action of the debtor, whether in his hands or in the hands

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of a fraudulent transferee. *Storm v. Waddell*, 2 Sand. Ch. 494, where the numerous cases are cited and fully discussed; *The Insurance Company v. Power*, 3 Paige, 365; *Roberts v. The Albany and W. S. Railroad Company*, 25 Barb. 662; *Macy v. Jordan*, 2 Denio, 570; *Field v. Sands*, 8 Bosw. 685. The rule would, in my judgment, be more satisfactory if confined to cases where the disposition of the property sought to be reached had been restrained by injunction, or where the property itself had been placed in the hands of a receiver, pending the suit. Indeed, it was suggested in *Storm v. Waddell*, above cited, that "in regard to chattels subject to execution the lien may depend upon the receivership," but in respect to equitable interests and things in action, it was distinctly held that the lien was acquired by the mere commencement of the suit. The rule is not elsewhere so broadly stated; and I think that its application to strict creditor's bills, where upon filing the bill an injunction was taken out and served with the subpoena to answer, is all that is fairly deducible from a careful examination of the other cases cited.

Where the action is simply to set aside an alleged fraudulent transfer, the lien, in the absence of any restraint by injunction upon the fraudulent transferee, must be purely theoretical. As a fact, it is dependent upon success in the action.

Considering, then, that a lien charges the specific property, and follows it into the hands of whomsoever it may come, it is apparent that the effect of extending the rule to the mere commencement of such an action, without any accompanying act, either placing the property in the custody of the law or staying its disposition, would be disastrous to the rights of innocent third persons. It would be more reasonable, in such cases, to limit the creditor to an equitable right to priority in cases of success, when, with the judgment setting aside the transfer, the lien would naturally and properly attach. Then the remedy in case of a disposition of the property prior to the acquisition of the lien,

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that is, prior to the decree — would be against the wrongful disposer, and not against the property itself, and thus third parties, as well as the creditor, would be protected. This question as to the existence of a lien becomes important in view of the provisions of the bankrupt law preserving intact all liens existing in good faith upon the property of the bankrupt. It was held under the bankrupt act of 1841, that where a lien had been acquired by the proceedings in a creditor's suit, that lien was not impaired by the discharge and personal exoneration of the bankrupt, but that the suit might proceed *in rem* against the property, and things in action which were the subject of the lien. *Lowery v. Morrison*, 11 Paige, 327; *Matter of Allen*, 5 Law Rep. 362, and cases above cited. But the plaintiff's difficulty here is twofold. Not only is the existence of a lien within the meaning of the bankrupt law exceedingly doubtful, but there is also a grave question as to whether the lien, assuming it to have existed, was not waived by the proving of the debt in the court of bankruptcy. In *Haxton v. Corse*, 2 Barb. Chan. Rep. 531, 532, the chancellor (affirming the vice chancellor in 4 Edw. Chan. R. 585) held that the complainants by going into the bankrupt court subsequent to the filing of their creditors' bill, and there proving their debt and opposing the bankrupt's discharge, had abandoned the lien acquired by their proceedings in chancery; that the retention of the lien under such circumstances was utterly inconsistent with the intent and meaning of the bankrupt act, and that by the mere proving of the debt the creditors' bill was absolutely relinquished, surrendered, and discontinued. This was a construction of provisions very similar to those contained in the present bankrupt law. The rule is the same in England; and under the bankrupt act of that country, where parties have proved their debts upon the footing of holding no security, they have been repeatedly ordered to deliver up to the assignees in bankruptcy the property on which they had a lien. 4 Younge & Collyer, 119; *Ex parte Solomon*, 1 Glyn & Jam. 25; *Ex parte Spottiswood*, 1 Fonb. 20; *Ex parte Hornby*,

In re Edward S. Stokes.

Buck B. C. 351 ; *Ex parte Downes*, 1 Rose, 96 ; *Ex parte Eggington*, Montague R. 72. Our present bankrupt law, section 20, permits the creditor to prove his debt for the balance which may remain after deducting the value of the property held by him as security, to be ascertained by agreement between him and the assignee, or by a sale under the direction of the court ; but it is quite clear that, if the creditor prove his full claim without reference to his lien or security, and without apprising the * bankrupt court of 130 its existence, such an act would be a waiver of the lien and a relinquishment of the security to the assignee. Otherwise the creditor, besides realizing on the collateral, might receive a dividend upon his entire debt, and thus reduce the dividend to which the other creditors would be entitled in case his debt had been placed upon a proper footing. If the plaintiffs in the present case proved their full debt without disclosing or referring to the lien which is claimed to have resulted from the commencement of this suit, then, under section 21, that lien is gone, and this suit is relinquished, discontinued, and discharged ; and even if these proceedings were disclosed, the question is still so serious that the right to interpose the supplemental answer is unquestionable.

The motion must be granted, with leave to plaintiffs to discontinue without costs.

March Term, 1868.

U. S. DISTRICT COURT, S. D. NEW YORK.

A motion on the part of the bankrupt to set aside the appointment of assignee can only be entertained by the district judge upon notice, and not by the register.

In re EDWARD S. STOKES.

I, EDGAR KETCHUM, one of the registers in said court of bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed

In re Edward S. Stokes.

to by the counsel for the opposing parties, to wit: Mr. John Winslow who appeared for the bankrupt, and Mr. G. A. Seixas who appeared for Jenk Budlong, and Jenk Budlong & Co., creditors of the said bankrupt.

These creditors attended on the 13th of March, the day fixed in the warrant for the first meeting of creditors, and duly proved, and filed proofs of their claims, and chose James Davis assignee, who was then appointed by the judge. The attorney for the bankrupt afterwards, and on the 19th of March, attended, supposing that to be the day for the first meeting of creditors, and then obtained the register's order for the creditors to show cause why the appointment of assignee should not be set aside, and the bankrupt be allowed to prove that he was not indebted to those creditors.

The creditors showed cause and insisted that only the judge upon notice could entertain this motion, and upon hearing in open court, or after a reference to take the testimony, this application not being unopposed, and so not being chamber business, such as the register, under the rules and orders, might hear and direct.

I was of opinion that the objection on the part of the creditors was well taken, and the counsel for the bankrupt then asked to have the question certified to the court, and written points on both sides were afterwards filed, which I transmit with this paper.

EDGAR KETCHUM, *Register*.

NEW YORK, *April* 15, 1868.

BLATCHFORD, J. The register is correct in his views.

The clerk will certify this decision to the register, Edgar Ketchum, Esq.

April 17, 1868.

In re Frederick Jewett.

U. S. DISTRICT COURT, N. D. ILLINOIS.

Where there are both individual and partnership creditors of a bankrupt, but the assets are individual only, though mainly consisting of goods purchased by the bankrupt from the partnership on its dissolution prior to the bankruptcy, and being principally the same goods, in the purchase of which the partnership debts had originated; the partnership creditors will be entitled to be paid *pari passu* with the individual creditors.

In re FREDERICK JEWETT.

THE facts appear in the following certificate of the register, Hon. Lincoln Clark.

This being the day fixed for the second meeting of creditors, the assignee, Mark Kimbell, Esq., made his report, by which it appeared that he had in his hands the sum of thirty-seven thousand six hundred and forty-six dollars and eighty-three cents (\$37,646.83) cash, as assets subject to distribution, as the creditors or the assignee should determine according to section 27 of the act of bankruptcy.

Upon due consideration and in view of what might be necessary to meet future expenses and provide for claims not yet proved, &c., a majority of the creditors being present and declining to decide, the assignee, at their request, decided that twenty-five per cent. of the cash in his hands should be distributed among those creditors who had proved their claims and who were legally entitled to receive a dividend out of the assets of the bankrupt's estate, and that the surplus should remain in his hands subject to future distribution. The said Jewett was forced into bankruptcy under the involuntary provisions of the act at the instance of the Third National Bank of Chicago.

At the time of the adjudication of bankruptcy the said Jewett was a hardware merchant in the city of Chicago, and previous to February 1st, 1867, was in copartnership with one Oliver R. Butler for the space of ten years, under the firm and style of Jewett & Butler. On said 1st of February the said Jewett purchased the entire interest of Butler.

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The entire indebtedness of the bankrupt was more than one hundred thousand dollars (\$100,000). The whole amount of the assets, good and doubtful, were estimated at between fifty thousand dollars (\$50,000) and sixty thousand dollars (\$60,000). About eighty-five thousand dollars (\$85,000) of claims were proved by the individual creditors of Jewett, and about sixteen thousand dollars (\$16,000) were proved by the creditors of Jewett & Butler.

The Third National Bank, who instituted the proceeding, were individual and joint creditors.

Upon this state of the proofs Mr. Clarkson, attorney for some of the individual creditors, and also for some of the joint creditors, contended that the individual creditors and the joint creditors should be paid *pari passu* out of the assets. Mr. Waller, attorney in behalf of some of the individual creditors, contended that the joint creditors could receive no portion of the assets of the bankrupt until the claims of the individual creditors were fully satisfied. There was no evidence of the solvency of Oliver Butler, nor that there were any partnership assets; nor was there any evidence to the contrary, and thereupon the question arose whether the joint creditors were entitled to share equally with the individual creditors in the division of the assets. The register overruled the objection made by Mr. Waller, and decided that all the creditors were entitled to equal distribution, which question, by the agreement of the respective attorneys, is certified to the court for its decision.

In this case the bankrupt is as much bound to pay the debts due and owing by Jewett & Butler, as he is to pay his own individual debts.

In fact, the debts owing by the partnership are several as well as joint; and the creditors have a right to proceed against any property or interest therein which he has for the satisfaction of their claims; and if there is any principle in equity which qualifies this rule it is not because the obligation of the bankrupt is any less, nor because all his interests in his property are not subject to the payment of his debts,

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but equity will interfere only to protect the relative rights of others as those rights shall be made to appear. It appears to me, then, that *prima facie* all the creditors of the bankrupt have the right to proceed against his property for the satisfaction of their debts.

It is undoubtedly a rule in equity that where there are individual creditors and partnership creditors, and individual assets and partnership assets, the individual creditors must resort to the individual assets, and the partnership creditors to the partnership assets; and it is not denied that this rule is applicable in bankruptcy. But how stands the rule when there are separate and joint creditors, but no joint or partnership assets, all the assets being those of the bankrupt? There are exceptions upon this subject. Story on Part. sec. 378, says: "These exceptions allow a joint creditor to share *pari passu* with the separate creditors in every case to which they are applicable. They are of three sorts: (1.) When the joint creditor is the petitioner for a separate commission against the bankrupt partner. (2.) Where there is no joint estate and no living solvent partner. (3.) Where there are no separate debts." The rule, then, is that "where there is no joint estate and no living solvent partner," the joint creditors shall share equally with the separate creditors.

How, then, is the exception to be manifested? Under what circumstances shall it be considered that there is no joint estate and no solvent living partner?

If there was any joint estate, the bankrupt was interested in it, and he was bound to set it out in his schedule, but he has set forth none. No doubt it would have been competent for the individual creditors to have proved that there was a joint estate and a solvent living partner, but they did not seek to do it, but contended that the individual debts should be first paid, although there was no joint estate, and although the individual debts would consume the whole amount of the assets.

Can it be that the joint creditors have no rights against the assets until they allege and prove negative propositions?

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In equity where two parties have a lien upon one fund, and one of the parties has a lien also upon a second fund, the party having a lien upon the first fund can compel the other party to exhaust his remedy upon the second fund, before he can resort to the first.

But must he not allege and prove the existence of the second fund?

I suppose it is clear that he must.

How does the statement of the facts and the proof in the foregoing case differ?

There is a view of the subject which would render it exceedingly unjust that the joint creditors should be postponed to the individual creditors.

The testimony of Jewett was taken in his deposition. He proves, that after he bought out the interest of his partner, he purchased but few goods; of course the debts of the joint creditors were made in the sale to the firm of Jewett & Butler of the goods which constituted chiefly the assets of Jewett.

Should these goods be turned away from the payment of the joint debts, which constituted the consideration for making them, to the payment of the individual debts?

“Equity alone can restrain the joint creditors from receiving their full dividend until the joint effects are exhausted.” See James on Bankruptcy, 91.

I am of the opinion, in the present state of the proofs, that the joint creditors should be paid *pari passu* with the individual creditors.

DRUMMOND, J. As there seems to be no joint fund or source of payment for the joint creditors, I think the decision of the register is right.

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Where A., one of two partners, sells his interest in the concern to his copartner, B., taking his notes therefor, and B. becomes bankrupt, leaving some of the notes unpaid, A. cannot receive a dividend from the assignee until all the partnership debts have been paid.

In re FREDERICK JEWETT.

THE facts are set forth in the following certificate of the register, Hon. Lincoln Clark.

This being the day fixed for the second meeting of creditors at the office of the register, for the purpose of hearing the assignee's report, and for declaring a dividend of assets among those entitled thereto, Oliver R. Butler claimed a dividend as a creditor of the bankrupt, upon a proof of claims heretofore filed, in the sum of ten thousand two hundred and fifteen dollars and forty-three cents (\$10,215.43).

The proofs consist of twelve promissory notes, each for the sum of \$750, made by the said Jewett to the said Butler, dated February 1st, 1867, payable 1st of May, 1868, and on the 1st of each and every month thereafter until the whole should be paid.

The said Oliver R. Butler had been copartner with the bankrupt for ten years anterior to the 1st day of February, 1867, at which time he sold his entire interest in the firm to the said Frederick Jewett for about the sum of \$25,000, and took from him his promissory notes in payment therefor. It appeared in evidence, by the deposition of the said Jewett, that the notes herein before described were a portion of those given in the purchase of the interest of the said Butler.

Clarkson, attorney for a portion of the creditors, and also for the assignee, objected, that the said Oliver R. Butler was not entitled to a dividend upon those notes. I sustained the objection, and decided that no dividend could be allowed upon the proof of them.

Waller, attorney for Butler, desired the matter to be certified to the court, the question being as to whether the said

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Butler was entitled to a dividend upon the basis of the said notes.

It appeared that the joint indebtedness of Jewett & Butler was some \$16,000, no portion of which had been paid by Butler. That Jewett, after the purchase of Butler's interest, bought but very few goods, from which the inference is clear that, had Butler been allowed to receive a dividend, he would have taken the proceeds of assets liable to the payment of his own debts, at the same time that he had not, as partner, paid the partnership debts.

That Butler could not have a dividend until all the partnership debts were paid, seems to me clear. Whether, after that, he would come in to share with the individual creditors, is a question not now calling for consideration.

DRUMMOND, J. In this case, it appearing that the only fund for payment is the individual property of the bankrupt, I have no doubt that there can be no dividend allowed to Butler so long as there is anything due from him. The decision of the register is consequently correct.

U. S. DISTRICT COURT, KENTUCKY.

Bankrupt may apply for a discharge within sixty days after adjudication in bankruptcy where debts have been proved, but no assets have come to the hands of the assignee.

In re B. W. & J. H. WOOLUMS.

BALLARD, J. The register certifies that on the day fixed by the court for the "creditors and other persons in interest" to appear at a court to be held by the register, and show cause, if any they had, why the prayer of the bankrupt's petition for a discharge should not be granted, Moore, Bre-maker & Co., creditors of the bankrupts, who had proven their debt, appeared and moved that the said petition be dismissed; that this motion was based on the ground that six

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months had not elapsed from the time of the adjudication of bankruptcy before the filing of the petition, and that the petition did not allege that "no debts have been proven against the bankrupts," but only "that no assets have come to the hands of the assignee;" that the bankrupts resisted this motion, and that the motion was overruled by the register, and that thereupon the creditors requested that the question "thus presented" be certified to the district judge for his opinion.

I more than doubt whether "the question presented" could properly arise in the course of the proceedings before the register. The petition was pending in the district court, and it seems to me that the question here raised ought to have been made in that court, before the judge thereof, by motion or demurrer or other proper pleading, and not before the register. It is true that it is the office of the register to "assist the judge of the district court in the performance of his duties under this (the bankrupt) act;" but he can dispose of no contested matters, and the question whether the petition of a bankrupt for his discharge should be dismissed on the motion of a creditor is in its very nature so obviously a contested matter that it would seem it could be raised only in the district court itself. But, waiving this question and the irregularity of the register's overruling the motion, and thus deciding a contested matter, I have no objection, as the parties desire to have the question raised disposed of, to treat the motion as regularly made.

The 29th section of the bankrupt act provides, that, at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee at any time after the expiration of sixty days, . . . the bankrupt may apply to the court for a discharge from his debts.

I see no difficulty in determining the meaning of this provision. It seems to me clear that it allows the bankrupt to apply for his discharge after the expiration of sixty days from the adjudication, and within six months, either when

In re Edward T. Sturgeon.

no debts have been proved, or when no assets have come to the hands of the assignee. It is only when both debts have been proved and assets have come to the hands of the assignee, that the discharge cannot be applied for until after the expiration of six months.

It is a little singular that Mr. James, in his notes, and Messrs. Avery and Hobbs, in their notes to this section, after stating correctly that the bankrupt may apply for his discharge after the expiration of sixty days if no debts are proved, or if, within that time, no assets have come to the hands of the assignee, state inadvertently, and incorrectly, that "if debts are proved or if assets are received by the assignee he cannot apply until after the expiration of six months from the date of adjudication." It is manifest that these authors have not given critical attention either to the language of the statute or to that employed by themselves.

As the petition sets forth the facts contemplated by one of the alternatives of the statute, that is, "that no assets had come to the hands of the assignee," it was properly filed within six months after the adjudication. The motion to dismiss is therefore overruled.

U. S. DISTRICT COURT, KENTUCKY.

Neither court nor register can be the general adviser of assignees as to their acts.

No opinion will be given on abstract questions certified to the judge by the register.

In re EDWARD T. STURGEON.

BALLARD, J. The questions certified by the register in this case could not, it seems to me, have arisen in the course of the proceedings before him. Neither the register nor the district judge is the general adviser of the assignee. What the assignee is to do with notes and accounts which he has been ordered to sell, and which he has not been able to sell, he must ascertain from his own attorney. When he applies "for a settlement of his accounts and for a discharge from all liabil-

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ity as assignee," it will then be time enough for the court to say what is to be done with the notes and accounts which he has not been able either to collect or sell. I therefore decline to give any opinion on the first question certified at this time.

The second question certified, if I understand it, is this: Can a bankrupt obtain his discharge who has never filed his petition therefor? The question is entirely abstract and I decline to answer it.

It appears that in this case the second and third meetings of creditors were ordered on application of the assignee, but still the register asks should this be done when the assets in the hands of the assignee, including the fifty dollars deposited by the bankrupt, will be insufficient to pay the costs of the proceeding. Manifestly the question asked is abstract, and consequently is not answered.

U. S. DISTRICT COURT, N. D. GEORGIA.

A prior lien gives a prior claim, and the district court may ascertain and liquidate such a lien.

The creditor who has a lien on property for the payment of his debt is admitted as a creditor only for the balance of the debt after deducting the value of such property.

In re ELLIJAH E. WINN.

IN this case the following questions arose in the proceedings of the same, and upon request of James R. Hanks, a judgment creditor, were certified by the register, Lawson Black, for the opinion of the district judge.

First. Does a debt secured by lien lose its lien by proof of the debtor?

Second. Does a judgment in this state retain its lien in bankruptcy?

Third. If a judgment is older than a mortgage, out of what fund shall it be satisfied?

My opinion is that the district court in bankruptcy is a

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court of equity, and that it is a court of original jurisdiction in matters of bankruptcy. The bankrupt is the complainant in equity, and each one of his creditors are defendants in the bill, and the court having original equity jurisdiction over all the parties and the subject matter of the suit, may pass any order, or decree in the case, it thinks proper for the purpose of doing equity between all the parties to the suit, either on the parties to the suit, or in relation to the subject matter of the suit, and that said orders and decrees so passed cannot be set aside nor inquired into in any other court, and that they are final and conclusive upon the parties and the subject matter of the suit, unless they are carried up in the manner prescribed in the bankrupt act. And any person disobeying the order or decree of the court, is liable to be punished for a contempt of the court. When a debtor is adjudged a bankrupt, all proceedings in a state court against him must stop, if the subject matter of the suit can be proven against his estate in bankruptcy, and no creditor, who holds a claim against the estate of the bankrupt, which might be proven in bankruptcy, whether the debt is secured by lien or not, can enforce such debt in a state court, except by the permission of the district court. The district court has no jurisdiction over a state court, but it has full and complete original jurisdiction of the bankrupt; and all the assets of the bankrupt; and over all the creditors of the bankrupt; and may fine and imprison any of the creditors of the bankrupt for interfering with the assets of the bankrupt, in a state court, without the permission of the district court, on any debt which might be proven against the estate of the bankrupt. And when the bankrupt obtains his certificate of discharge, it releases him from all debts, demands, and liabilities which might have been proven against his estate in bankruptcy. The court appoints a day and gives all the creditors of the bankrupt notice of the time and place to prove their debts against the bankrupt, and under this notice the creditor who holds no security for his debt, proves his debt as unsecured and entitled to share *pro rata* out of the general fund. The

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creditor whose debt is secured by lien, proves his debt as secured by lien on a certain piece of property of such a value, is not entitled to vote for assignee nor participate in the general fund, with the unsecured creditors, until the property on which his lien is secured, is applied towards the satisfaction of his debt. See 22d section of the bankrupt act as to proof of debts with security.

It is necessary for the creditor, whose debt is secured by lien, to prove or liquidate his debt as secured by lien, that the court may be fully informed how and in what manner to dispose of the assets of the bankrupt, so as to do equity between all the creditors of the bankrupt.

The only way a secured creditor can lose his lien on the property, is by a release of the lien on the property and proving the debt as an unsecured claim. When the secured debts are proven or liquidated, the court has power, by order, to authorize the assignee to redeem or remove the lien by paying the creditor the money due, if the assignee is in a condition to do so, and, if not, the court may permit the creditor to take the property, on which he holds a lien, at its value, towards the satisfaction of his debt; or the court may order the property sold, subject to the incumbrances as ascertained by the court; or the court may order the property to be sold free from all incumbrances, and that the said liens be secured and protected on the money arising from the sale of the said property, in the same manner as if the said property had been sold to satisfy the said lien in a court of law.

Second. My opinion is that a judgment in this state retains its lien in a court of bankruptcy in the same manner and to the same extent as it does in a court of law.

The bankrupt act, section 20, mentions mortgages, pledges, and liens on the property of the bankrupt to secure the payment of a debt due the creditor. Here the question arises; what did congress mean by the word lien? They certainly did not intend that each district judge should determine for himself what is, and what is not, a lien on the property of the bankrupt, without some rule or law to guide him, by which

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he may determine by law what is a lien. My opinion is that congress meant by the word "lien" all the liens protected by the laws of each state, and that all the liens protected by the state law should be protected in bankruptcy.

In section 21 of the act, no judgment can be taken against the bankrupt pending his adjudication, except by permission of this court, for the purpose of ascertaining the amount of the debt, upon which no execution can issue. If the judgment has no lien, and does not infringe or interfere with the rights of the unsecured creditors, why prevent the creditor from taking the judgment? By section 14 of the act, the assignee takes the property of the bankrupt with the like right, title, power, and authority to sell said property as the bankrupt could have done. He acquires no other or better title to the property than the bankrupt had, and if there was a lien on the property in the hands of the bankrupt, the same lien follows the property into the hands of the assignee.

Third. The judgment of Hanks is older than the Gate City mortgage, and has a general lien on all the property of the bankrupt. The mortgage has a special lien on a certain piece of the bankrupt's property, and if the mortgage creditor cannot get his money out of this piece of property he may lose his lien and his debt also. Therefore the lien of the judgment on the mortgage property is held in abeyance until all the other property or general fund of the bankrupt is exhausted by the judgment.

It is therefore the judgment of the register that a debt secured by lien does not lose its lien by proof of the debt as secured by lien. And that a judgment in this state retains its lien in a court of bankruptcy in the same manner and to the same extent it does in the state court. And that an older judgment cannot take mortgaged property until all other property of the general fund of the bankrupt is exhausted by the judgment.

ERSKINE, J. A prior lien gives a prior claim, and the district court may ascertain and liquidate a lien. (Bankrupt Law, section 1.) By section 11 the debtor must, in his

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schedule, make a statement of any existing lien, pledge, mortgage, judgment, collateral, or other security, &c., and he must show what incumbrances are on the estate. By section 14 the assignee takes "all the estate" of the bankrupt, with the like right, title, power, and authority to sell, &c., that the bankrupt had, and the assignee may discharge any mortgage or conditional contract, or pledge, or deposit, or lien upon any property, at any time. Section 20. The creditor who has a lien on property for the payment of his debt, is admitted as a creditor only for the balance of the debt after deducting the value of such property. Section 27 declares that all creditors, whose debts are duly proved and allowed, shall share in the distribution. Thus we have the system: the court has jurisdiction to ascertain and liquidate the lien, and the debtor must state [disclose] the lien to the court. The assignee takes the estate, coupled with the right and power of the debtor to sell, &c. The debtor could only sell subject to the lien. The quantity of his interest was the right to the property as subject to the lien. The creditor is allowed to prove the balance of his debt to the extent of the balance; it must be "duly" proved, and if allowed, he would share in the distribution.

The clerk will certify this opinion to Mr. Register Black.

NOTE BY THE JUDGE. It is proper that I advert to my approval, on the 23d November last, of the opinion of Mr. Register Garnett Andrews in the matter of Felkner, Nowell & Co., bankrupts. The approval was too general in its terms, and apparently affirms all the views expressed by the register. The affirmance ought to have been confined to what I consider the only pertinent question certified for my decision, namely, the protection of the property temporarily under the peculiar circumstances of the case, and should not have extended, even by implication, to the subject of liens, or whether judgments share the estate of the bankrupt, *pro rata* or otherwise, under the statute.

The clerk will transmit a copy of this correction to Mr. Garnett Andrews, register in the Sixth District.

In re Nathaniel O. Cram.

U. S. DISTRICT COURT, MAINE.

The liability of a bankrupt as indorser on certain promissory notes having become absolute, a creditor holding a mortgage of property from the maker thereof as security for their payment, may, nevertheless, prove the full amount of the notes against the bankrupt as indorser.

In re NATHANIEL O. CRAM.

IN the course of the proceedings in this cause before Register Fessenden, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Messrs. Shepley & Strout, who appeared for the creditor presenting the claim, and Mr. Francis Fessenden, who appeared for Schopeler & Co., one of the creditors of said bankrupt.

The Casco National Bank present a claim against N. O. Cram, for \$80,900, which they allege to be the amount due on five certain promissory notes for \$98,000, given by the Portland Shovel Manufacturing Company, payable to the order of said N. O. Cram and indorsed by him, and on which the liability of the said Cram has become absolute. It appears from the deposition in support of the claim, that the said Shovel Company has mortgaged to said bank, to secure the payment of said notes, all the real estate of said Shovel Company, and certain personal property described in the notice of foreclosure annexed to said deposition. The mortgages of personal property have been foreclosed, the time for redeeming the same has expired, and a portion of the personal property sold, and the proceeds thereof indorsed on said notes. The officer making the deposition in behalf of the bank is unable to fix any valuation upon the property conveyed to the bank, and without surrendering the security, claims to prove for the whole amount of the notes, deducting the amount realized in cash from the sales of the personal property. The register declined to admit proof of the claim at this stage of the proceedings, because:

First. The bank can only be admitted as a creditor for

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the balance of its debt, after deducting the value of the security held by it.

Second. The mortgages on personal property, having become foreclosed, the property becomes absolute in the creditor, and operates as a payment and discharge *pro tanto* of the debt, and the value thereof should be ascertained and applied to the diminution of the claim.

Third. The value of the property conveyed to the bank as aforesaid cannot be ascertained without the intervention of an assignee.

FOX, J. The liability of the bankrupt as indorser of the notes of the Shovel Company has become absolute, and in such a case, by the 19th section of the act, a creditor may ordinarily prove his claim against such indorser. It is contended that the present case comes within the provisions of the 20th section of the act, the creditor holding the mortgages of real and personal estate from the makers of said notes as security for their payment, and for that cause he cannot be allowed to prove his claim against the bankrupt, prior to the choice of the assignee. The clause of this section is as follows: "When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon, for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. . . . If not so sold, &c., the creditor shall not be allowed to prove any part of his debt." As the action of an assignee is requisite to carry out this arrangement, I admit that when the property which is to be sold or its value ascertained, is the property of the bankrupt, the creditor holding a mortgage or pledge of it cannot be allowed to prove his claim prior to the election of assignee; but such is not the condition of the present claimant; he has not "any

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mortgage or pledge of real or personal estate of the bankrupt or a lien thereon for securing of a debt owing to him from the bankrupt" — it is true that he has in whole or in part, mortgage security for the payment of the same notes which he offers to prove against the estate of the bankrupt; but this property so mortgaged, was never the property of the bankrupt, but belonged to an entire stranger to these proceedings, the maker of these notes, who is not shown to be bankrupt, and over whose property, in the present stage of the cause, the district court has no authority or jurisdiction whatever; the case presented is therefore certainly not within the letter of the act, as the claimant has not "any mortgage or pledge of real or personal property of the bankrupt or lien thereon, and on a careful examination of the whole act, I do not think it is within its spirit or purpose, or that it should be drawn within its provisions by strained or forced construction of the language employed.

What does the act require shall be done with the property so mortgaged or pledged? The creditor must deduct from his claims the value of the property to be ascertained by agreement with the assignee, or by sale, by order of court, or he may release to the assignee his claim upon the property, and be admitted to prove his whole debt; each and all of these provisions are supposed to be applicable to the property, it is property so situated, that either course may be adopted as may be deemed most advisable by the creditor.

Would a court in bankruptcy order a sale of property thus situated, mortgaged by a third party, an entire stranger to the proceedings in bankruptcy? Who would be bound by such a sale if the court should order it to be made, and what title would a purchaser acquire at such a sale against the mortgagor? What is to be sold, the absolute property? if so, what becomes of the equity of redemption, if the estate is not foreclosed and the mortgage debt is not of the full value of the property? No one can claim that the court could thus sell the whole estate, and destroy the mortgagor's right of redemption, which, in real estate, by the laws of Maine,

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continues for three years after the mortgagee has entered for foreclosure, for breach of condition of the mortgage — if the note and mortgage should be sold by order of court, leaving unimpaired the right of redemption of the mortgagee, what becomes of the claim of the party against the bankrupt indorser of the note which he has disposed of? — by its sale he has parted with the security and contract, which was the foundation of his claim against the bankrupt estate; he has no longer any debt to prove against the estate; it belongs to the purchaser of the note. Like consequences would result, if he transfers to the assignee his claim on the property. To pass any title of the mortgaged property to the assignee, he must assign his note secured thereby, and the bankrupt would be no longer his debtor.

It is quite manifest, therefore, that this mortgagee can neither sell his mortgage nor assign the same to the assignee, as contemplated by the act; but it is claimed that he may agree with the assignee upon the value of the mortgaged estate, and deduct that amount from his whole claim, and prove the balance against the estate of the bankrupt. I hold he is not compelled to do this and take the estate at the agreed value; he has his election which course he will pursue. The statute, I think, intended he should enjoy the privilege of determining whether he would or not take the mortgaged estate; and unless his title is such that he can elect which course he will adopt, I am of opinion his case is not within this provision of the act.

The same section of the act further provides that if the value of the property exceeds the sum for which it is held as security, the assignee may release to the creditor the bankrupt's right of redemption thereon, on receiving such excess, or he may sell the property, subject to the claim of the creditor therein, and in either case the assignee and creditor respectively shall execute all deeds and writings necessary and proper to consummate the transaction.

What right has the assignee to redeem the property of an entire stranger, which he could convey to the claimant, or

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what interest in property so situated, could he sell, subject to the claim of the creditor thereon ; and what writings could he execute which could consummate any title, or which would be worth the paper on which they were drawn.

Every line of this section, as I think, points most distinctly and directly to property of the bankrupt, and only to property of the bankrupt, which the district court in bankruptcy can deal with ; and that it never contemplated the sale of property of third parties, held by the claimant as security for his demand. It would have hardly been possible for congress to have used more precise and positive language to declare such to have been its intention, than it has employed in this section ; whilst if it was designed to reach security given by third parties, it could have been so declared with equal certainty.

This construction, I think, is also sustained by the close of the 21st section of the act, allowing "double proof" when the bankrupt is liable upon a bill or note, in respect of distinct contracts, as a member of two or more firms, carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy ; or when liable as a sole trader and also as member of a firm. In such cases, the creditor may prove against the estates respectively liable, upon such contracts manifesting that the general intent of the act is to allow a claimant the entire security of all parties liable for the debt, and of course, the benefit of all collaterals from such parties ; this provision of this section is quite important, as fixing definitely a point in bankruptcy proceedings, about which a very serious conflict exists in the English authorities.

I have examined carefully all the authorities at my command, touching the question in controversy, so far as I have met with any relating to it, and they all concur in this view, with the exception of some of the earlier decisions in Massachusetts, upon the construction of a clause in the insolvent law of that state, which is quite similar in its provisions to the one now under consideration from the bankrupt act. The first case is *Lanckton v. Wolcott*, 6 Met. 306. In this case, Shaw,

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C. J., held, that a party holding a note signed by a principal and two sureties, all of whom were in insolvency, could not prove the full amount of his note against the principal, but must deduct the value of a mortgage given to him by one of the sureties, and prove for the residue of his debt—the clause in the insolvent act then under consideration, provided “that when any creditor shall have any mortgage or pledge of any real or personal estate *of the debtor* for securing the debt, &c., the property should be sold and the proceeds applied towards the payment of the debt, and he shall be admitted as a creditor for the residue, if any.” The learned chief justice says in his opinion, if the term “debtor” in this sentence is necessarily to be limited to the insolvent debtor, whose estate is in the progress of settlement, then the case is not within the letter of it, because the mortgage was not made by the insolvent; but it is equally consistent with the manifest equity and policy of the statute to construe it to mean any person liable for the debt. It is a general rule of equity that when a final settlement is to be made, as in cases of bankruptcy, all mutual accounts should be balanced; that a pledge of property held as security for a debt, shall be deemed in the nature of set-off or payment, an extinguishment *pro tanto*, and the balance only is the actual amount which the creditor has trusted to the personal responsibility of the debtor, and it is for that sum only that he can come in *pari passu* with other creditors, who have relied on the same responsibility. If the debt is reduced and diminished by a pledge thus given by one of the debtors, it is equally reduced as against the creditors, if the creditor holds a mortgage made by either of the debtors; it is within the equity, if not the letter of the statute, and its value must first be deducted. The only authority cited to sustain this doctrine is *Amory v. Francis*, 16 Mass. 308, a proceeding against an administrator of an insolvent estate, in which it was decided that a creditor holding a mortgage given by the deceased debtor as security for the payment of the debt, and of less value than the amount of the debt, could only be allowed to

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prove against the estate for the difference between his debt and the value of the property mortgaged—a proposition which no one could question, but which had no relevancy to the case then under consideration, as the property was not the property of the insolvent, but of a third party.

The decision in *Lanckton v. Wolcott* was followed in *Richardson v. Wyman*, 4 Gray, 553. There the debt was a joint and several note of three persons, who, as tenants in common of a parcel of real estate, had mortgaged it to the holder of the note. One of them was in insolvency, and it was decided that one third part of the land should be sold and applied in discharge of the note, and the value of the remaining two third parts should be ascertained by an assessor, and deducted from the amount due, and the creditor allowed to prove against the insolvent estate for the balance. It was admitted by the court that the case was not within the letter of the insolvent act, but it was claimed to be within its spirit, and the decision was based on *Lanckton v. Wolcott*. The learned judge admits that the statute did not prescribe any mode of ascertaining the amount to be allowed upon the demand for the two third parts of the mortgaged estate not belonging to the insolvent, and he therefore was obliged to devise a scheme of a valuation by an assessor in order to reach it. These cases, without reference to a single English authority in bankruptcy, adopt the conclusion that whatever property the creditor holds as security for his demand, whether from the insolvent or any other party, must be first appropriated to the reduction of the claim, and the balance only admitted against the estate.

In *Agawam Bank v. Morris*, 4 Cushing, 99, the court appear to have regarded the letter rather than the spirit of the act, as it allowed the petitioners, as indorsers, to prove their whole claim against an insolvent partner, on a partnership note, although a prior indorser held collateral security for the payment of the note given to him by the solvent partner, the indorser holding the security being the president of the bank which held the note, and testifying that the security was

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deposited for the purpose of making the bank and himself fully secure. See, also, *Richardson v. City Bank et als.* 11 Gray, 263.

It will be seen that the language of the insolvent act of Massachusetts is, "any real or personal estate of *the debtor*," and that the court had felt itself at liberty to include under the term "*debtor*" any party liable for the debt. In the bankrupt act the language is more precise and restricted, "any real or personal property of the *bankrupt*." The word "bankrupt" is personal, confined to a single party, and cannot, I apprehend, be reasonably construed as including all others in any way answerable for the same demand.

I have examined numerous English decisions in bankruptcy bearing upon this question, but I can find no support in any of them for the principles laid down by the supreme court of Massachusetts; but on the contrary the very reverse has been sustained by the highest authority. In 1743, Lord Hardwicke, in *Ex parte Bonnett*, 2 Atkyns, 537, which was a case of proof against a bankrupt estate, said, "if these bonds," which had been given to the creditor as security, "had been joint bonds from the bankrupt, and another, to the claimant, he might have come in for his whole debt, under the commission, without being compelled to deliver up such joint securities."

The rule which universally prevails in bankruptcy in England is, that the creditor must apply all the property of the bankrupt, real or personal, which he holds as security for his claim, in reduction of his demand, and prove only the balance against his estate; but the security will not go in reduction of the claim, unless it is the property of the estate against which the proof is offered.

Pari's case, 18 Vesey, 65, decided by Lord Eldon, I *think, fully confirms this proposition. In that case, 134 the petitioning creditors held bills of exchange, drawn by certain parties in Demerara, and accepted by the bankrupts, who were partners with the drawers, but doing business in England — there being distinct firms carrying on

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business at Demerara and in Liverpool — the creditors held a mortgage on certain plantations in Demerara, given to them by the drawers as security for these bills, — the objection was taken that the bills could not be proved against the estate of the bankrupt acceptors, without deducting the value of the mortgages. Lord Eldon ruled that the creditors could prove for the full amount of the bills, without deducting the value of the security, notwithstanding the partnership. The marginal note of Vesey is full to the point: “Creditor’s right in bankruptcy to prove and avail himself of all collateral securities from third persons, to the extent of twenty shillings in the pound.

“Bills drawn and accepted by the same persons, constituting distinct firms, proof against the acceptor, without deducting the value of a security from the drawer.”

This decision, made in 1811, so far as I can ascertain, has ever since been recognized as the rule in bankruptcy in all the English courts.

In *Ex parte Goodman*, 3 Maddox, 373 (1818), a creditor was allowed to prove his whole debt against a bankrupt, notwithstanding he held an assignment of an interest in certain estates, made to him by third parties, at the bankrupt’s request, as security for debt.

Pari’s case was adopted *In re Plummer*, 1 Phillips, 56 (19 Eng. Ch. R.), 1841. In this case a creditor, whose debt was secured by the joint and several covenants of two parties in trade, and also by a mortgage on part of the joint property, was admitted to prove his debt against the separate estate of each, without surrendering or releasing his mortgage security.

Lord Lyndhurst, in his opinion, says “what are the principles applicable to cases of this kind; if a creditor of a bankrupt holds a security on a part of the estate of a bankrupt, he is not entitled to prove his debt, under the commission, without giving up or realizing his security; for the principle of the bankrupt law is, that all creditors are to be put on an equal footing; and therefore, if a creditor choose

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to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt ; but if he has a security on the estate of a third person, this principle does not apply. He is, in that case, entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether realize more than twenty shillings in the pound. That is the ground on which the principle is established ; it is unnecessary to cite authorities, it is too clearly settled to be disputed."

" In administration under bankruptcy, the joint estate and separate estates are considered as distinct estates, and accordingly it has been held that a joint creditor having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security. Now this case is merely the converse of that, and the same principle applies to it."

Peacock's case, 2 Glyn & Jamison, 27, was where a joint creditor held security from one of the joint debtors, and was allowed to prove his debt against the joint estate without surrender or sale of his security.

In *Ex parte Adams*, 3 Montague & Ayrton, 265, it was decided that the security is not to go in reduction of the claim, unless it is the property of the estate against which the proof is offered. In *Ex parte Heddersby*, 2 Mont., D. & De Gex, 487, the creditor holding the estate of the wife of the bankrupt as security for his debt, was allowed to prove for the whole debt. The English authorities were examined and approved by Mr. Justice Story, *In re Babcock*, 3 Story, 399, a case arising under the former bankrupt act. In his opinion in this case, that most learned judge says, " In relation to the point of the creditor having securities in his hands for the payment of the debt in bankruptcy, a distinction is taken between the case of a security given to the creditor by the bankrupt himself, of his own property, and the case of a security of a third person, transferred to the creditor by the bankrupt, or otherwise. In the former case, the creditor is not allowed to prove his debt against the bankrupt unless he

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surrenders up the security, or it is sold with his consent, and then he may prove for the residue of his debt which the security, when sold, does not discharge. In the latter case, he may prove his debt in bankruptcy without surrendering the security of the third person, which he holds, and may, notwithstanding such proof, proceed to enforce his security against such third person, provided, however, he does not take, under the bankruptcy and the security, more than the full amount of his debt." In that case, an accommodation acceptor of a bill of exchange went into bankruptcy, the holder of the bill having attached certain property of the drawer and having also proved his demand against the estate of the acceptor.

Judge Story says, "From the principles which have been stated, admitting the attachment to be a security, and the bankrupt to be a mere accommodation acceptor, it is clear that the creditor has a right to proceed against the bankrupt for his debt in bankruptcy, and also against the other parties to the bill under his attachment, until he has received the full amount of his debt, for it is not a security given by the bankrupt, of his own property, but it is a security obtained by the creditor against other parties to the bill, by a proceeding *in invitum*.

This opinion of the circuit judge for this district has never been questioned, so far as I am informed, by any circuit court, or in any opinion of the supreme court of the United States, and being in conformity with the whole course of decisions under the English bankrupt acts, should govern in the present case, and I therefore decide that the Casco National Bank was not barred from proving the full amount of the notes in question against the bankrupt's estate, on account of the mortgage of real estate given to the bank by the makers of said notes, as security for their payment, said mortgage not being foreclosed, and being merely a security for the debt. The mortgages of the personal property of the Shovel Company, held by claimants to secure the payment of these notes, present a further question, entirely independ-

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ent of that growing out of the mortgage of the real estate to secure the same notes. Those chattel mortgages have been foreclosed, and the title to the property covered by them has become absolute in the claimants, and they have since disposed of some of this property. By such a foreclosure, the mortgagees, under the laws of Maine, have received payment of a portion of their debt, equivalent to the value of the property mortgaged, on the day the title to this property became absolute in the mortgagees by their foreclosure. This value has not yet been in any way determined, but whatever it amounts to should be applied in reduction of the claim, and proof allowed only for the balance of the claim remaining unpaid, — it is not enough that the claimants are willing to indorse on the amounts received by them from sale of a portion of the property; the whole value of the property should be indorsed; it became the property of the claimants the moment the title became absolute; it was at their risk from that time; if it had been lost or destroyed, or in any way subsequently diminished in value, it would have been at the charge of its owners, the claimants, and so if it had subsequently increased in value, it would have been their gain and advantage. As the amount to be allowed in reduction of the notes for the personal property mortgaged to the claimants by the makers of the notes, as security therefor, and of which the claimants became the absolute owners by foreclosure of said chattel mortgages, was not ascertained and determined, and was not allowed by the claimants in reduction of their claim on these notes. I think for the second cause assigned by the register, in his certificate, he was correct in his decision not to allow these notes to be proved in the present stage of the cause. When a claim against a bankrupt has been paid in part by the bankrupt, or any other party, the balance only is provable against the estate.

The conclusion of the register, that the claimant can only be admitted as a creditor for the balance of its debt, after deducting the value of the security given to it by the Shovel

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Company, so far as it applies to the mortgage of the real estate which is not foreclosed, is not correct ; such security cannot affect the proof of the claim until foreclosure, and an absolute title in the mortgagees of the mortgaged estate.

137 * U. S. DISTRICT COURT, N. D. NEW YORK.

The district court has power to allow amendments in petitions and proceedings in bankruptcy ; but amendments that would introduce into the petition entirely new acts of bankruptcy will be disallowed.

In re FREDERICK C. CROWLEY & WILLIAM L. HOB-
LITZELL.

HALL, J. This case was commenced by the filing of the creditor's petition on the 3d day of June, 1867. At that time the general orders and forms promulgated by the justices of the supreme court could not be obtained ; and the petition, as is shown by affidavit, was necessarily drawn without any reference to the forms or general orders applicable to such cases.

The order to show cause was returnable on the 24th day of July, 1867, but the hearing was, by stipulation, adjourned from time to time, until the 23d day of October thereafter, when, after a partial hearing, an order was made continuing the case until the 13th of November, and giving permission to the petitioners to apply on that day for leave to file an amended petition, upon ten days' notice of such application being served, with copy of the proposed amendments.

Further adjournments were made by stipulation, and it was not until the 24th instant that the motion for leave to file the amended petition was made and argued. .

I do not doubt that this court has power to allow amendments in bankruptcy petitions and proceedings, and that in allowing such amendments it should be governed by substantially the same principles as those which govern the allow-

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ance of amendments in similar cases in other courts; and such, I understand, has been the practice of the English and American courts in bankruptcy cases. Judiciary Act of 1789, sec. 32; 1 Stat. at Large, 91; *Ex parte Thwaites*, 13 Vesey, 324; *In re Blackburn*, 1 De Gex, 332; James Bankruptcy, 279; *Ex parte Cheesewright*, 1 Rose, 228; *Frisby's case*, 4 Law Rep. 483. But the bankrupt acts having been considered as penal in their character, so far as proceedings against the bankrupt are concerned, the strict rules which apply in actions for penalties and forfeitures have been rigorously adhered to; and it is obvious that in respect to the amendment of sworn petitions there should be no relaxation of the strict rules which prevail in courts of equity in cases where leave to amend a sworn bill or sworn answer is applied for.

All courts require special reasons for the allowance of amendments in sworn petitions, or in other pleadings which are required to be verified by the oath of the party; and where the object is to introduce new facts, or change essentially the grounds of the prosecution or defence, they are properly disinclined to allow such amendments except for very special reasons, and in cases where they are clearly required in furtherance of justice, and are applied for without unreasonable delay. *Smith v. Babcock*, 3 Sumner, 583; *Thorn v. Germand*, 4 Johnson Ch. 363; *W. R. Bank v. Stryker*, 1 Clarke Rep. 380; *Steele v. Sowerby*, 6 Durnford & East, 171; *Cross v. Kaye*, Ib. 443; *Swift v. Eckford*, 6 Paige, 22; *Lloyd v. Brewster*, 4 Paige, 537; *Maddock v. Hammett*, 7 Durnford & East, 55; *The Harmony*, 1 Gallison, 123; Story Eq. Pl. sec. 896. Such amendments in common law pleadings not verified, are frequently, if not generally, refused. *Goddard v. Perkins*, 9 N. Hamp. Rep. 488. And as a general rule, it should be satisfactorily shown that the allegations to be added are probably if not certainly true; that they are material to the merits of the controversy; that the party has not been guilty of gross negligence; and that the mistakes to be corrected or the new

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facts to be alleged, have been ascertained since the original petition or pleading was sworn to, and that application to amend has been made without unnecessary delay. *Carter v. Wood*, 1 Baldwin Rep. 289; *Calloway v. Dobson*, 1 Brockenhough, 119; *Mills v. Campbell*, 2 Younge & Coll. 398; *Lovett v. Cowman*, 6 Hill, 223, 227; Story Equity Pleadings, sec. 896.

Less stringent rules would encourage carelessness and indifference in drawing and verifying such papers, and would open the door to the introduction of testimony manufactured for the occasion. Courts are, therefore, disinclined to allow, except under very special circumstances, amendments which change the ground of prosecution or defence, and especially when the statute of limitations has run. *Bank v. Stryker*, 1 Clarke, 380, and other cases above cited; *The John Jay*, 3 Blatchford, 67; *Shield v. Barrow*, 17 Howard U. S. C. Rep. 130; *Smead v. McCord*, 12 Ib. 467; Story Equity Pleadings, sec. 896; *Williams v. Cooper*, 1 Hill, 637; *Weston v. Worden*, 19 Wendell, 648.

But amendments in respect to a cause of action or defence already imperfectly set forth, are allowed with much greater liberality. *Salter v. Bryant*, 12 Wendell, 228; *Miller v. Watson*, 6 Ib. 506; and they will even be allowed to prevent a successful plea of the statute of limitations. *Tobias v. Harland*, 1 Wendell, 93; *The Schooner Adeline*, 9 Cranch, 244.

Courts are also disinclined to allow amendments for the purpose of aiding in a hard or unconscionable action or defence, and in suits for penalties and forfeitures; and the defence of usury and the statute of limitations have generally been looked upon with disfavor on applications for amendment. In penal actions, or forfeiture cases, and in actions for slanderous words, amendments introducing an entirely new cause of action have been refused, as in some cases above cited.

And the English courts regard the bankrupt act as highly penal in its consequences (*Ex parte Cheesewright*, 3 Rose

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Bank. Cases, 229); but as equality among creditors is equity, and the general policy of the bankrupt act is to secure this equity, and as it is quite evident that opposition to the petition in this case is made in the interest of creditors who have secured a preference, I should not be inclined to refuse an amendment solely upon the ground that bankruptcy proceedings are penal in their character. Nor, on the other hand, should I regard the objection that the petition was not filed in six months after the alleged act of bankruptcy as an unconscionable defence. The presentation of the petition within the six months is a condition precedent to the creditors' right to proceed. The omission need not be pleaded, or otherwise specially set up by answer to the petition; and this case, like all others involving a question of judicial discretion, must be determined upon the peculiar facts of the case. Nevertheless, the discretion to be exercised, being a judicial and not an arbitrary discretion, I have endeavored to ascertain the general principles which have governed courts in analogous cases, and shall seek to decide this motion in accordance with such principles.

With this purpose in view, I shall proceed to consider very briefly the particular facts in this case.

The merely formal defects in the petition are sufficiently accounted for and excused.

The more material amendments desired are four in number. The first of these is rather a continuation and extension of the allegations of the facts and incidents upon which the allegations of the act of bankruptcy last alleged in the original petition were founded; and though not an amendment in form merely, it can hardly be said to be analogous to a case in which it is sought to change entirely the ground of action or defence; and, as the provisions of the bankrupt act had not become familiar to the profession, and the practice under it was entirely unknown when * the 138 original petition was filed, I deem it proper to allow this amendment.

The amendments of mere formal defects and the amend

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ment just alluded to, will be allowed upon the payment by the petitioners of thirty-five dollars costs.

The other amendments proposed are of a different character. They would introduce into the petition entirely new acts of bankruptcy, and they are founded upon facts not stated or referred to in the original petition, and the acts of bankruptcy alleged are stated to have been committed more than six months prior to the application for the order allowing these petitioners to apply for leave to amend their petition.

For these reasons these amendments ought not, I think, to be allowed.

But there is an additional objection to the allowance of these amendments, which is entitled to much weight.

The first of the acts of bankruptcy is alleged to have been committed on the second of March last, the second on the 11th day of the same month, and the third at divers times between the 2d day of March and the day of filing the original petition; and no reason is given why these acts were not embraced in the original petition. It is not shown that the petitioners and their attorney were not advised of the facts on which these allegations are based at the time the original petition was prepared, nor is it shown that the allegations now sought to be introduced were omitted to be inserted in the original petition from inadvertence, mistake, or other reason which might excuse such omission. This, and that the application to amend was made within a reasonable time after the necessity of the amendment was discovered, should have been shown.

The amendments which seek to introduce allegations of the acts of bankruptcy last referred to, will not be allowed.

In re William Leeds.

U. S. DISTRICT COURT, E. D. PENNSYLVANIA.

In deciding whether giving a warrant to confess judgment is an act of bankruptcy, the character of the alleged bankrupt's business may be taken into consideration; and where it appears that the purposes of the warrant of attorney may have been to enable the debtor to continue in business, and that there was no intention to defeat or delay the operation of the bankrupt law, it is not a sufficient ground for an adjudication of bankruptcy.

A suspension of payment of commercial paper for fourteen days is not, in the absence of fraud, an act of bankruptcy.

In re WILLIAM LEEDS.

THE alleged bankrupt was a dealer in live stock. His business done through bank, alone, had exceeded \$500,000 per annum. His real estate, worth about \$8,000, was incumbered to the amount of less than half its value. The alleged acts of bankruptcy were giving a warrant to confess judgment, and a suspension of payment of his commercial paper for fourteen days.

CADWALADER, J. This case has been ably argued. The peculiar character of the business in which the alleged bankrupt was engaged must be principally considered. He had no such stock in trade as would be swept away through the necessary or ordinary effect of an execution upon a judgment under a warrant of attorney. His real estate was, moreover, of sufficient value to constitute an available partial security for such a judgment.

The former course of his transactions also shows that the purpose of the warrant of attorney, which constitutes one of the alleged acts of bankruptcy, may probably have been to enable him to continue his business. The application of much of the evidence would, in an ordinary case, therefore, be different from its application to the case before me. After some hesitation I have concluded that there was neither such an intended preference, nor such an intent to defeat or delay the operation of the bankrupt law, as to make this warrant of attorney a sufficient ground for the adjudication asked.

The other alleged act of bankruptcy is a suspension of

In re William H. Magie.

payment of his commercial paper for a period of fourteen days. I am now required to decide whether, in the absence of any fraud, such a suspension is an act of bankruptcy. This question has, in some cases, been heretofore submitted to me without argument. The decisions in other districts had been that the suspension of payment of such paper, though not fraudulent, was, if continued for this period, an act of bankruptcy. I was not prepared to make definitely such a decision. In the cases which were thus submitted without argument, I followed the decisions in the other districts; but stated on the record in every case, that the adjudication was not to be considered as a precedent. In the case now before me the question has been argued. In the mean time the point has been decided by Judge Field, in the district of New Jersey (1 N. B. R. 113, *quarto*), somewhat differently from the decisions in other districts to which I have referred. My opinion is, that the suspension of payment, unless fraudulent, is not an act of bankruptcy, and that in this case it does not appear to have been fraudulent.

The petition is dismissed, but without costs.

April 23, 1868.

U. S. DISTRICT COURT, S. D. NEW YORK.

One M., formerly in business for himself in Chicago, had been employed a year and over as a bookkeeper in New York city, and lived with his father at Elizabeth, New Jersey :

Held, on a voluntary petition to be declared a bankrupt in Southern District of New York, that this court had no jurisdiction.

In re WILLIAM H. MAGIE.

REGISTER JAMES F. DWIGHT, certified that in the course of the proceedings in said cause before him, the following question arose pertinent to the said proceedings.

Facts. On the 3d day of March, 1868, William H. Magie filed his petition for adjudication in bankruptcy, &c.,

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with schedules A and B attached, in the clerk's office of this district, and the matter was duly referred to me as register to take such proceedings as are required by the act.

It appearing by the petition, duplicate copy of which was (with the schedules) filed with me on the 3d of April, that the petitioner respectfully represents that he has been a general agent and clerk for twelve months next immediately preceding the filing of this petition, at New York city, within this judicial district. I examined the petitioner under oath, on the 9th of April, touching the matter of his residence or business to the end of deciding if this court has jurisdiction of his case.

The petitioner deposed that he resided with his father at Elizabeth, New Jersey, and has done so since he came from Chicago, Illinois, about four years ago. That he was formerly in business for himself at Chicago; that he had been engaged in looking after a personal matter since he came from Chicago, with the intent of returning there. That he has been engaged as a bookkeeper for a firm in William Street, New York city, since January 1, 1868. That previous to January 1, 1868, and since about the middle of October, he had been engaged in keeping books with a firm in Wall Street, New York city. That he had not been engaged with any other persons in New York city, nor had any business connections save as thus stated, nor been engaged in business otherwise for himself. That he was unmarried. The petition did not aver place of residence. There are only three creditors.

Upon this state of facts I declined to make adjudication in bankruptcy of the petitioner, on the ground that the district court for the Southern District of New York had no jurisdiction of the case, inasmuch as the petition was not "addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of filing his petition," &c.

To which decision and refusal the bankrupt excepts, and through his attorney prays that the question may be certified to the judge, as to whether, upon these facts, this court has

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jurisdiction of the petition, and whether adjudication should be had.

Which is granted, and this certificate forwarded to the judge for his decision and opinion on the point raised.

OPINION OF THE REGISTER.

In my opinion the law intended to confer jurisdiction in these courts only, where the petitioner would be known publicly as a resident and citizen ; or where he had such business relations with the public generally as would equally cause him to be known.

And it could scarcely be said that a person whose business was only that of a book-keeper or clerk in a place where his name did not appear in public, "carried on business" in a way that would give any publicity to his occupation or person.

The object of this provision as to jurisdiction would seem to be to prevent imposition upon creditors and fraudulent discharges ; and there is no hardship worked to petitioners, for, if having no regular business by which they are known, they may apply in the district where they reside.

Which facts and opinion are submitted for the opinion of the judge.

JAMES F. DWIGHT, *Register.*

BLATCHFORD, J. I think the register was correct in his decision. The principles laid down by this court *In re Kinsman* (1 N. Y. Legal Observer, 309), in reference to a kindred provision in the bankrupt act of 1841, make it improper for this court to assume jurisdiction in this case.

The clerk will certify this decision to the register, James F. Dwight, Esq.

April 28, 1868.

In re Phelps, Caldwell & Co.

*U. S. DISTRICT COURT, KENTUCKY.

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Creditors who have proved a debt against a partner of a firm in bankruptcy, have no right to participate in the election of the assignee for the company, who must be chosen by the creditors of the company only.

The powers given by a letter of attorney to several persons jointly, cannot be exercised by one of the attorneys alone.

A meeting to prove debts and choose an assignee, should be organized at the hour designated in the official notice, and should be kept open until an assignee is chosen, or it is ascertained that no choice can be made.

In re PHELPS, CALDWELL & Co.

BALLARD, J. The register certifies for decision by the district judge, the following questions, as having arisen in the course of the proceedings before him, to wit :

First. "Have creditors who have proved debts against one of the bankrupt partners, a right to participate in the electing the assignee?" The register thinks they have. He says, "he sees no reason why creditors of members of a firm should not participate in the electing an assignee for the firm; for such assignee is not only assignee of the firm, but of each member's estate."

I do not agree with the register. The only provision to be found in the whole bankrupt act which relates directly to the question propounded is to be found in the 36th section. It is as follows: "That where two or more persons who are partners in trade shall be adjudged bankrupt the joint stock and property of the copartnership and also the separate estate of each of the partners shall be taken; and all the creditors of the company and the separate creditors of each partner shall be allowed to prove their respective debts; *and the assignee shall be chosen by the creditors of the company.*" Whilst the statute is explicit that the separate estate of each bankrupt partner shall pass to the assignee in bankruptcy, it is equally explicit, that it is the creditors of the *company only*, who shall participate in choosing him.

It can hardly be necessary to consider the reason on which a provision so express is founded; but it may not be inap-

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appropriate to say that every creditor of a firm is also a creditor of each partner, but that a creditor of one member of a firm is not a creditor of the firm, nor has he any interest in the property of a bankrupt partnership. His interest generally in property which his debtor owns in common with partners, is in the share or part that may be left to his debtor after paying all partnership debts and all claims due the copartners. Of course, when the partnership is insolvent, this share will be nothing. It follows that if a separate creditor of a partner were allowed to participate in choosing an assignee who should have the management of partnership property, he would have a voice in the management of property in which he has no interest whatever; but if the election of the assignee who takes both the firm and separate property of each member, be confined to the firm creditors, no one has a voice who has not an interest in the whole property which passes, though some may be excluded who may have an interest in part.

Second. "When a letter of attorney is given to several persons *jointly*, can the powers therein given be exercised by one of the attorneys alone?" The register thinks not, and I agree with him. But the register should understand that a letter of attorney in the form prescribed by general orders, Form No. 14, or Form No. 26 is not a joint authority, and that a power conferred by such a letter may be exercised by any one of the persons to whom it is addressed.

Third. "How long should a meeting advertised for a certain hour, be considered as open for transacting the business for which such meeting is held?" The meeting here referred to, as the context shows, is the meeting contemplated by the 12th and 13th sections of the bankrupt act, and by the warrant, Form No. 6, called to choose an assignee. The register thinks that "this meeting should be considered open during the business hours of the day on which the meeting is advertised to be held."

I do not agree with the register. I think the meeting should be organized at the hour designated in the notice, or

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as soon thereafter as practicable, and should be "kept open" until a choice be made, or it is ascertained that no choice can be made. The terms of the warrant, Form No. 6, require that the creditors shall "*meet*" to choose one or more assignees, not merely on a given day, but at *a given hour*.

Section 12 of the act provides that at this "meeting" "one of the registers of the court shall preside."

Section 13 provides "that the creditors shall at the first meeting, held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and number of the creditors who have proved their debts."

Taking the two sections together, it seems to me that the manner of choosing or electing an assignee by the creditors of a bankrupt is not, as the register seems to suppose, similar to that observed in electing civil officers at our state elections. The creditors do not go to the place designated, and at or after the hour fixed in the warrant, separately deposit their ballots or votes in presence of the register; but they actually "meet" and so far organize themselves into a meeting as to have a presiding officer, to wit: the register designated, and when this meeting is organized, at, or after, the hour named in the notice (it cannot be organized before), the creditors in the meeting, if they be the greater part in value and number, proceed to choose an assignee. The manner of proceeding is not prescribed by the statute, and may therefore be determined by the creditors themselves. It should, however, conform to the general practice of meetings; and Form No. 15, prescribed by general orders, seems to contemplate that each creditor shall vote, and that his name, residence, and amount of debt shall be recorded. If, on the first vote, no choice be made, by reason of a greater part in number and value failing to concur, a second, third, or any number of ballots, may be had until the required concurrence be obtained. If no such concurrence be had and the meeting adjourn *sine die*, the contingency happens which authorizes the judge, or, if there

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be no opposing interest, the register, to appoint one or more assignees.

Whether this meeting, after organizing and failing to make choice of an assignee, can adjourn to another day and then proceed to choose one, is a question which is not distinctly answered by the statute. Section 12 requires an adjournment when "it appears that the notice to the creditors has not been given as required in the warrant." But, manifestly, this adjournment must have taken place in the case supposed, even if the statute had not required it, because the very foundation of authority in the creditors of a bankrupt to meet and choose an assignee is, that all creditors are notified to meet for such purpose in the manner required by the act. It seems to me, therefore, the requisitions that an adjournment shall take place in such case, does not even inferentially preclude the creditors, who meet in pursuance of a proper notice, from adjourning to another day and then proceeding to choose an assignee. True, section 13 provides "that the creditors shall, at the first meeting . . . choose one or more assignees," and that if no choice is made by the creditors at *said* meeting, the judge, or, if there be no opposing interest, the register, shall appoint one or more assignees; but I am inclined to the opinion that the meeting of creditors to choose an assignee is the "*first* meeting" in contemplation of the act, whether it is held on the day designated in the warrant or on a day to which the meeting, assembled on that day, has adjourned, the several adjournments constituting but one meeting and affecting the proceedings in no other way than would a necessary postponement of business from one to another hour of the same day. The term "first meeting" employed in section 13 seems not to mean the actual first assembling of creditors, but to refer to the meeting called to choose an assignee — whether it be held on the day designated in the notice or on a day to which it adjourns, and is used in contradistinction to the terms "second meeting" and "third meeting" employed in General Order 25, in Forms Nos. 28 and 29 and in sections 27 and 28 of the act, which

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second and *third* meetings are called to consider the matter of a dividend.

Both the statute, section 11, and the warrant issued in pursuance thereof, Form No. 6, contemplate that this "first meeting" of creditors is held for them to "prove their debts" as well as to choose an assignee. This provision is copied almost literally from the Massachusetts insolvency law (see chap. 118, section 18, of the General Statutes), and in that state it seems to be the rule that creditors can prove their debts only at a meeting. 7 Metcalf, 431-434; 4 Cushing, 584; 4 Cushing, 529; 11 Cushing, 375. Of course, if this be the rule under the bankrupt law, an adjournment of the first meeting may be sometimes actually necessary. It is only the creditors who have proved their debts, that can participate in choosing an assignee. The proving of debts must therefore precede the choosing of an assignee. But it may often happen that a bankrupt owes a hundred or more debts, and that it may be impossible, owing to the complicated nature of some, to go through the proofs of one tenth of them, on the day designated in the warrant and notice. If, therefore, in such case, the meeting cannot adjourn to the next, or another, day to take proof of other debts, it will follow that a power, which the statute contemplates shall be exercised by a greater part in number and value of the whole, is actually exercised by only a few creditors, representing but a small portion of the debts. The plainest principles of justice would seem to require such an adjournment of the meeting, from day to day, as would furnish proper opportunity to all creditors present to prove their debts, and thus qualify themselves to join in selecting an assignee.

It may be that, under the bankrupt law, creditors may prove their debts before the first meeting, and elsewhere than at a meeting; still they are not required to do so, and certainly they should be allowed to do at the meeting what both the statute and warrant, Form 6, authorize them to do there, that is, "prove their debts."

The necessity for allowing an adjournment of the first

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meeting, to give opportunity to creditors present to prove their debts under the bankruptcy law, is almost as great as if it required proof of all debts to be made at a meeting. What can or should be done if the creditors persist in adjourning from day to day without choosing an assignee, I need not now say, since it is hardly a practical question. The interest of creditors so obviously requires the prompt choosing of an assignee, that it is not to be supposed the choice will be unreasonably delayed. Should such a contingency arise and be properly made known to the court, some appropriate remedy may doubtless be found.

I am not sure that more has not been said than is necessary to answer the questions propounded by the register, and I am not certain that what I have said in respect to the right of the first meeting "to adjourn," conforms to the interpretation of the statute. My apology for what I have written is that the interrogatory of the register is very comprehensive and * seems to refer to the whole manner of conducting the first meeting, and that the conclusion which I have announced seems consonant to reason and to conform to the interpretation put by the supreme court of Massachusetts on a provision in their insolvency law quite similar to that in the bankrupt law which we have been considering. *Rice v. Wallace*, 7 Metcalf, 431-434.

I have had little or no opportunity to ascertain what is the actual practice elsewhere in respect to this matter of adjourning the first meeting. If the practice has not yet been established in any of the district courts, it has no doubt been settled both in England and in Massachusetts, and, as our bankruptcy statute is understood to have been copied in the main from the English bankruptcy and Massachusetts insolvency statutes, I shall willingly conform the practice here to the practice there, if it be ascertained to be different from that which is here indicated as proper.

The clerk will send a copy of this opinion to the register, John H. Ward, Esq.

In re Sutherland.

U. S. DISTRICT COURT, OREGON.

The denial of a debtor, in his answer to a petition of bankruptcy filed against him, is not sufficient to prevent adjudication, when it admits the confession of a judgment, although it denies that there was a fraudulent intent to give a fraudulent preference; for such negative allegation implies that the judgment was conferred with an intent to give a preference, although not a fraudulent one. 19 B. R. 10

In re SUTHERLAND.

DEADY, J. On November 30, 1867, certain creditors of R. Sutherland filed a petition in bankruptcy against said Sutherland charging him with divers acts of bankruptcy, committed on and after November 19, 1861, and praying that he be declared a bankrupt.

On the filing of the petition, an order was entered requiring the debtor to show cause, on the first Monday in January, 1868, why the prayer of the petition should not be allowed.

On January 1, 1868, the debtor, by his solicitor, filed a paper in the words of Form No. 61, in the general orders and proceedings, prescribed by the justices of the supreme court, signed by himself and such solicitor, but not by the clerk; and also a special answer to the petition, verified by his own oath.

At the time appointed for showing cause the parties appeared, and the solicitor for the petitioners moved for judgment on the pleadings, and the solicitor of Sutherland at the same time moved for an order setting down the cause for trial by jury, as demanded in the paper filed by him.

The motion for judgment is based upon the assumption that Form No. 61, entitled, "Denial of bankruptcy and demand for jury by debtor," is simply a rule entered by the clerk at the instance of the debtor, for a jury trial, and that the statement therein, that Sutherland "appears and denies that he has committed the acts of bankruptcy set forth in said petition and avers that he should not be declared a bankrupt for any cause in said petition alleged," is a mere recital,

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which is based upon and presupposes, that the debtor has shown cause why he should not be adjudged a bankrupt, by filing an answer, in writing, traversing the allegations of the petition.

Sections 40 and 41 of the bankrupt act, provided that, upon the filing of a petition, "the court shall direct the entry of an order requiring the debtor to appear and show cause why the prayer of the petition should not be granted ;" and that, upon the day appointed to show cause, "the court shall proceed summarily to hear the allegations of petitioner and debtor, and shall, if the debtor on the same day so demand in writing, order a trial by jury, at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy."

An allegation is the statement of a party of his cause of action or defence. To show cause is to make appear, to give a reason. From the well understood signification of these expressions in the act, and the nature of the proceeding, I infer that it is intended that on the day appointed to show cause, the debtor shall appear and plead to the petition — answer it in writing. *In re Drummond*, lately decided in the district court for Indiana (1 N. B. R. 10, *quarto*), it appears that the debtor "filed a plea denying the charges" in the petition.

As at present advised, I must hold that the paper filed in the words of Form No. 61, is merely a demand for a trial by jury, and not an answer to the petition. It is neither a showing of cause nor an allegation by the debtor, and the statement contained in it concerning the denial of the debtor of the act of bankruptcy alleged in the petition, must be construed as a recital by the clerk of a denial already and otherwise made by the debtor ; and this recital is made for the purpose of showing on the face of the entry that it is authorized by what has already transpired in the proceeding — the filing of an answer to the petition controverting the allegations therein contained.

Whether this answer must be general or specific or verified,

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or not, appears to me to depend upon the general rules of the court in regard to the pleadings, or any special rule which may be made concerning pleadings in bankruptcy. The general rule of this court is, that answers must be specific and verified. No good reason is perceived why any greater latitude in pleading should be allowed the defence in a petition in bankruptcy, than in any other legal proceedings.

The true object of pleading is the same in either case — to narrow the controversy to the point or points really in dispute between the parties. To allow the debtor to deny the allegations of the petition by the entry of a rule or order with the clerk, or a general unverified answer, would often impose upon the petitioner the useless trouble and expense of proving that which the debtor well knew to be true, and which he would not deny under oath.

In considering the motion for judgment, the denial recited in the demand for a trial by jury will be laid out of view. The only question, then, which arises upon the motion is, whether the answer admits sufficient to authorize the court to give judgment pronouncing Sutherland a bankrupt.

Among other things, the petition alleges that Sutherland, on November 19, 1867, then and prior thereto, well knowing that he was insolvent, confessed two judgments in favor of third persons, with intent to give a fraudulent preference to such persons over his other creditors.

The answer tacitly admits the confessing of the judgments and the insolvency of Sutherland, but denies that the judgments were confessed "with any fraudulent intent or with the fraudulent intent to give a fraudulent preference" to the creditors in such judgments.

This traverse is too broad. Although the petition alleges that the intent was to give a fraudulent preference, the word fraudulent must be treated as surplusage and not traversable. The bankrupt act (section 39) does not use the word fraudulent in this connection. It declares that if an insolvent person shall confess a judgment "with intent to give a prefer-

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ence to one or more of his creditors," he "shall be deemed to have committed an act of bankruptcy." The object of the act is to secure an equal distribution of the property of an insolvent among his creditors; and to this end, it makes it an act of bankruptcy for such a person to prefer one creditor over another, without reference to the question whether such preference would otherwise be considered fraudulent in morals of law.

The petition in this case, and the answer following it, seem to have been drawn upon the theory, that a confession of judgment by an insolvent person is not necessarily an act of bankruptcy, but that to constitute an act of bankruptcy such confession must have been made with an intent to prefer one creditor over another. Upon this construction of the law, the intent being an essential ingredient of the act of bankruptcy, it would be necessary to aver it in the petition, and such averment would be traversable — liable to be controverted.

But it is questionable if section 39 will bear this construction. The acts described in the clause, "or who being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or give any warrant to confess judgment," seem to be declared acts of bankruptcy, without reference to the intent of the party committing them; or rather, it is conclusively assumed that an attempt to give a preference is a necessary inference from the commission of such acts; and therefore it is not necessary to aver that the act was done with such intention, because the question is not open to controversy.

In re Drummond, quoted above, the court says: "Now, it is a rule that every sane man is presumed to intend the probable consequences of his voluntary act. The consequences of this transfer by Drummond of all his property to a portion of his creditors, were not only that it would probably give them a preference, but that it would necessarily and certainly pro-

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duce that effect. He must have known that the consequence would follow that act, and he must therefore be conclusively presumed to have intended it. In so doing he committed an act of bankruptcy; and a judgment that he is a bankrupt must follow.

It is also true, that, in this case, the intent with which the transfer was made by Drummond appears to have been averred in the pleadings, but if, in the language of the court, that intent "must be conclusively presumed" from the fact of the transfer under the circumstances, it cannot legitimately be the subject of a distinct issue in the pleadings. The fact being established, only one consequence can follow it, and that the law conclusively presumes was intended. What the law conclusively presumes, cannot be controverted either by pleading or proof.

The views upon the question of intent are advanced suggestively, and subject to correction upon further argument and investigation in future cases that may arise.

The present motion may be satisfactorily decided, upon the construction of the law, that a confession of judgment by an insolvent, to constitute an act of bankruptcy, must be with intent to prefer one creditor over another, and that such intent must be averred in the petition and may be controverted by the debtor.

The answer, as has been stated, tacitly admits the confession of the judgments and the insolvency of Sutherland. The necessary consequence of this act was to give a preference to the creditors named in these judgments over the petitioners. That necessary consequence the debtor must be presumed to have intended, notwithstanding his denial of it by his answer. The presumption which the law deduces from the facts admitted by the debtor overcome his denial of an intention to give a preference, and conclusively proves the allegation of the petition, that the judgments were confessed with the intent to give a preference over other creditors. 19 B. R. 10

Besides, the denial of the debtor of an intent to prefer one

In re Robert C. Rathbone.

creditor over another, is expressly limited to the denial of a fraudulent intent to give a fraudulent preference. This kind of negative allegation involves what the books call an affirmative implication, that the judgments were confessed with an intent to give a preference, though not a fraudulent one. This implication supports the material allegation in the petition ; that a preference of one creditor over another was intended by the debtor.

141 * The bankrupt act (section 39) in effect prohibits an insolvent from giving any preference to one creditor over another from any motive, upon pain of being declared a bankrupt on the petition of the injured creditor or creditors.

So it may, for the purpose of argument, be taken for granted that this denial of the debtor is true in point of fact — that he did not fraudulently intend to give a fraudulent preference, and yet as it impliedly admits that the act complained of was done with an intent to give a preference, it is insufficient.

The petitioners are entitled to judgment on the pleadings.

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* U. S. DISTRICT COURT, S. D. NEW YORK.

A bankrupt must be held to have wilfully sworn falsely in the affidavit annexed to his inventory where he states therein that he has no assets when he has concealed his property, derived from profits in the firm of which he is really a partner, by covering them (the profits) up in the hands of his wife.

He is further guilty of fraud in not delivering such property to his assignees. Discharge refused.

In re ROBERT C. RATHBONE.

BLATCHFORD, J. The specifications for trial in this case, in opposition to the discharge of the bankrupt, are the fifth, seventh, and eighth. I do not think there is any evidence to sustain the averments of the fifth specification, namely, that the bankrupt is entitled to the two lots in Sixty-third Street, New York. As to the seventh specification, the evidence

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shows that the bankrupt is not, and never was, the owner of any one of the life insurance policies mentioned in the specification. The eighth specification is "that the business of Rathbone Brothers & Co., brokers, &c., in Broadway, New York, was started and built up by said bankrupt, and has so continued under his supervision to the present time; the net profits whereof are now about \$35,000 per year; that said bankrupt professes to receive only about one tenth of the annual profits of said business as a clerk, and in lieu of salary, which amounts to about \$3,600 per annum, his said wife represents by purchase or pretended purchase, for \$4,000, a one fifth interest in said business, worth about \$7,000 per year, all of which business, except those portions actually and not fraudulently sold to others, are assets in the hands of said bankrupt and should inure to the benefit of his creditors." The bankrupt sets forth, in this inventory of assets, no assets whatever, except his personal clothing, of the value of \$100. In November, 1855, the bankrupt and one Halsey, being in partnership, under the firm name of Robert C. Rathbone, failed and made an assignment for the benefit of their creditors. The business of Rathbone Brothers & Company, referred to in the specification, is that of insurance brokers. The firm has no capital, and the business does not require any. It is the business of procuring to be effected insurance on property, and the remuneration for the services rendered consists of a percentage commission. The success of the business depends wholly on the personal exertions of those engaged in carrying it on, and there is no profit in it derived from the buying or selling of merchandise, or the employment of money or property. The bankrupt and one Hamlin commenced this business about January 1, 1855. On the 1st of January, 1856, Aaron A. Rathbone joined them. About the 1st of January, 1857, Hamlin withdrew, leaving Aaron H. Rathbone in the business with the bankrupt, under the name of Rathbone Brothers. This state of things continued until 1858, when the bankrupt withdrew and became assistant secretary of an insurance company,

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where he remained till 1861, at a salary of \$2,000 per year. In 1861 the bankrupt became a clerk to Aaron H. Rathbone, in the insurance business, at a salary of \$2,500 per year. On the 1st of November, 1863, Aaron H. Rathbone took into the business with him, as partners, Henry C. Seward, Theodore H. Knox, and William C. Greig, the bankrupt continuing with the firm as clerk. In this firm Aaron H. Rathbone was interested in the profits to the extent of three tenths, Seward three tenths, Knox two tenths, and Greig two tenths. Greig paid \$8,000 to Aaron H. Rathbone for the two tenths interest in the profits of the firm. The profits of the firm were, on an average, \$35,000 per year. About the 1st of October, 1866, Knox withdrew from the firm, selling out his two tenths interest to the wife of the bankrupt for \$4,000, which she paid to Knox. Since that time she has claimed and received two tenths of the profits of the business, although she has not personally rendered any services in the business. The profits since she came into the firm have averaged \$35,000 per year. At the time the bankrupt's wife so went into the firm, a written agreement was made between the firm and the bankrupt, under which the bankrupt has from that time been in the receipt of one tenth of the profits of the business, as a salary or compensation for his services. Thus he and his wife together received out of the profits of the firm, to the making of which they contributed nothing but the personal services of the bankrupt, three tenths of such profits, being a share amounting to \$10,500 per year.

Now, although the money which the bankrupt's wife paid to Knox for the privilege of receiving the two tenths share in the \$35,000 profits per annum may have been her own individual money, inherited by her from deceased relatives, it is impossible not to see through the thin disguise whereby the bankrupt has, in fraud of his creditors, been really a partner in the firm, receiving for his personal exertions in the business, three tenths of the profits, being the sum of \$10,500 per annum, the manipulation being attempted to be effected by putting one tenth in the shape of a salary to

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himself and two tenths in the shape of an interest owned by his wife. The firm had no benefit from any services, or money, or capital, or property of the wife. The \$4,000 she paid to Knox did not go to the firm. The husband was a real partner all the time. The money paid by the firm to the wife for the two tenths, was paid to her, in fact, as trustee for her husband, certainly as against his creditors, and there can be no difficulty in its being reached by the assignee in bankruptcy for the benefit of those creditors. The firm paid the entire three tenths which the bankrupt and his wife received solely for the personal services of the bankrupt. The firm received no other consideration for the three tenths, but the personal services of the bankrupt; the bankrupt alone earned the two tenths, which went to the wife, and it must be regarded as a gift by him to her in fraud of his creditors, and as property held by her in trust for him. She has it now. She owns a house at Fort Washington, for which she paid \$11,000, and two lots in Sixty-third Street, and the personal property and furniture in the house. The bankrupt resides with her, and they and their children have been supported out of this income of \$10,500 a year in a style of living shown by the evidence, as to servants and horses and carriages, entirely inconsistent with any honest and fair dealing by the bankrupt towards his creditors, whose debts not barred by limitation, and nearly all in judgment, amount to over \$10,000. The eighth specification is substantially proved, and the facts set up in it and shown by the testimony to exist, bring this case within several of the grounds for withholding a discharge set forth in the 29th section. He has wilfully sworn falsely in the affidavit annexed to his inventory, in stating that he has no assets; he has concealed his property derived from profits in the firm in which he is and has been really a partner by covering them up in the hands of his wife; and he has been guilty of fraud in not delivering such property to his assignee. A bankrupt law which should admit of a discharge in such a case as this

In re Darius Tallman.

would not be likely to remain long on the statute book. The discharge is refused,

Mr. *John H. White*, for the bankrupt; Mr. *H. P. Herdman*, for the creditor.

U. S. DISTRICT COURT, S. D. NEW YORK.

The ten days, within which specifications in opposition to the discharge of a bankrupt must be filed, date from the adjourned day of the hearing of the order to show cause; and not from the day first appointed.

In re DARIUS TALLMAN.

I, ISAAC DAYTON, register in bankruptcy to whom was referred the order to show cause why the said bankrupt should not be discharged as a bankrupt from his debts, do certify that by an order granted by me, the creditors of the said bankrupt were required to show cause before me why the bankrupt should not be discharged from his debts returnable before me on the 20th day of April, 1868.

That on the last named day Joseph Hacher, an opposing creditor of said bankrupt, duly entered his appearance as such opposing creditor, and the proceedings upon such order to show cause were thereupon adjourned to the 2d day of May, 1868, at 12 o'clock, the day being fixed two days beyond the time limited by the rule for filing objections to the discharge of the bankrupt.

That on the 2d day of May, 1868, the said Joseph Hacher appeared by attorney and presented his objections in writing to the discharge of said bankrupt, and asked to have the same filed, to which the counsel for the said bankrupt objected on the ground that by the 24th Rule they should have been filed within ten days after the day on which the creditors were required to show cause. The register sustained the objection and refused to file the paper and proceeded to take the last examination of the bankrupt.

And this certificate is made for the purpose of obtaining

In re Darins Tallman.

the decision of the honorable district judge, whether the register ought to have filed the paper, or ought to have suspended proceedings upon the objections of the bankrupt for his * discharge, to enable the creditor to apply 146 to the court to be allowed to file his specifications of objections.

OPINION OF THE REGISTER.

By the 4th section of the statute the register has the power, and it is made his duty, to pass the last examination of the bankrupt in cases where the assignee or a creditor does not oppose. By the order of the court made in this bankruptcy on the 29th day of January, 1868, the register is directed to sit in chambers on the return of the order to show cause, and to pass the last examination of the bankrupt if there be no objection. The 24th General Rule requires that the specifications of objections to the discharge of the bankrupt shall be filed within ten days after the day when the creditors are required to show cause. Such specifications not having been filed within the ten days thus limited, there was not any opposition to the discharge of the bankrupt, and by the statute and the order of the court it was the duty of the register to proceed to pass the last examination of the bankrupt, and in respect to the performance of this duty the register had not any discretion. ISAAC DAYTON, *Register*.

BLATCHFORD, J. The register states that the proceedings upon the order to show cause, were, on the 20th day of April, 1868, adjourned to the 2d day of May, 1868. This being so, the case stood as if the 2d day of May were the day originally fixed for the creditors to show cause; and any creditor entitled to show cause could do so on the 2d day of May, and could file his specifications within ten days after the 2d day of May. Therefore, the creditor in this case was entitled to file his specifications on the 2d day of May, and the register ought to have received them. By the terms of the adjournment, the register made the 2d day of May, within General Order No. 24, the day when the creditors were required to

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show cause. If there had been no adjournment, the case would have been different.

The clerk will certify this decision to the register, Isaac Dayton, Esq.

U. S. DISTRICT COURT, INDIANA.

When a debtor, before the passage of the bankrupt act, conveyed his property with intent to defraud his creditors, and afterwards was adjudged a bankrupt, his assignee in bankruptcy may maintain an action to recover back such property for the benefit of the creditors.

BRADSHAW, *Assignee*, v. HENRY KLEIN *et al.*

MCDONALD, J. This is a bill in chancery, filed by William A. Bradshaw, assignee of Armstead M. Klein, a bankrupt, against Henry Klein and others.

The bill charges that the bankrupt, before the passage of the bankrupt act, transferred certain property to one John A. Klein, without consideration, for the purpose of defrauding the bankrupt's creditors; that said John A. Klein, without consideration, transferred the same to the defendants, who now claim title thereto; and that the bankrupt has ever retained, and now retains possession of said property. And it prays that the property be made assets in the assignee's hands for the benefit of the bankrupt's creditors.

The defendants demur to the bill, and the only question made in support of the demurrer is this: Can the assignee of a bankrupt maintain an action to recover back property conveyed away by him with intent to defraud his creditors?

In support of the demurrer, it is argued that the assignee takes such rights of action only as the debtor had before he was adjudged a bankrupt; and that, as he could not have sued before that adjudication to recover back property conveyed by him in fraud of his creditors, so his assignee cannot, afterwards, sue to recover it back.

There can be no doubt that a transfer of property, made

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with intent to defraud creditors, is valid as between the parties to it ; and that the seller, having delivered out the possession of the property, cannot recover its possession. To such a case the maxim applies, that *in pari delicto potior est conditio possidentis*. And it is true that the 14th section of the bankrupt act transfers to the assignee all the rights of property and of action previously held by the bankrupt. But does the assignee represent the rights of the bankrupt, and his rights only ? Does he not also represent the rights of the creditors ?

It is very clear that, but for the adjudication of bankruptcy, the creditors might subject to the payment of their debts property conveyed by their debtor in fraud of their rights. But now, since he is adjudged a bankrupt, this right is taken away from them. The law will not allow them to sue at all for their debts. And if the assignee cannot maintain an action to have the fraudulent conveyance set aside, and the property subjected to the payment of debts due to creditors, there can be no remedy whatever in such a case. So to decide, would altogether defeat the operation of the statutes against fraudulent conveyances in all cases of bankrupt debtors. For if the ground assumed in support of the demurrer be tenable, then a failing debtor may to-day transfer all his property with intent to defraud his creditors, and six months hence be adjudged a bankrupt, without any power in any person to reduce the property thus fraudulently conveyed to assets for the payment of his debts. Courts ought to be very reluctant to indulge a doctrine fraught with such consequences. Under the bankrupt act of 1841, the supreme court of Mississippi has, indeed, held this doctrine. But I have no hesitation in pronouncing that decision erroneous. A very high authority, Judge Curtis, under the act of 1841, decided differently. He held that " there is a broad distinction between a bill by a bankrupt, the author of the fraud, and one by the assignee, who seeks to recover the property for the benefit of the very interest sought to be defrauded ; and that the ground of refusing relief to the author of the fraud is a principle of

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public policy, which forbids the court to be auxiliary to a plan for evading the law, and depriving the creditors of their just and legal rights; but that when the assignee sues, the case is reversed—to grant the relief, is to act in accordance with these rights of creditors, and in opposition to the contemplated fraud, while to refuse it would be to aid in its perpetuation.” *Carr v. Hilton*, 1 Curtis Rep. 230.

If, as Judge Curtis held, under the act of 1841, the assignee might maintain an action to set aside a fraudulent conveyance made before that act was passed, the reason for allowing such an action under the bankrupt act of 1867, is much stronger. The act of 1841 merely provided, as the present act provides, that the bankrupt's title to all his property should vest in his assignee, with the right to sue for the same. 5 U. S. Statutes at Large, 442, 443. But the bankrupt act of 1867 goes a step further, and in the 14th section declares that “all the property conveyed by the bankrupt in fraud of his creditors . . . shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee.”

Counsel for the defendant insist, however, that the 35th section of the act modifies the language of the 14th section above cited, and limits the right of action to set aside fraudulent conveyances to four, or, at most, six months. But I cannot assent to this construction. I think the provision above cited from the 14th section, relates to the state statutes against fraudulent conveyances, and to these only; and that the 35th section of the bankrupt act has no reference to those statutes, but is only intended to reach frauds on the bankrupt act. The two sections relate to different subjects; neither of them, therefore, can be construed as explaining, modifying, or limiting the operation of the other.

On the whole, I conclude that an assignee in bankruptcy may maintain an action to set aside fraudulent conveyances made by the debtor before he is adjudged a bankrupt, and even before the bankrupt act was passed, provided the person to whom the transfer was made was a party to the fraudulent

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intent, or received the transfer without valuable consideration, and provided the action is not barred by the statute of limitations.

The demurrer is overruled,

Mr. *Ritter*, for complainant; Mr. *March*, for defendant.

U. S. DISTRICT COURT, MINNESOTA.

A mortgage given when a debtor was insolvent is not valid, if the mortgagee had reasonable cause to believe that the debtor was insolvent, and that the mortgage was given in fraud of creditors; hence, the prayer of a petition asking that such mortgage be first paid off from the avails of the mortgaged property must be denied.

THE MERCHANTS' NATIONAL BANK OF HASTINGS v.
DANIEL W. TRUAX, *Assignee of* WALTER C. COWLES.

NELSON, J. The Merchants' National Bank holding a mortgage upon a large amount of the personal property of Cowles, who was adjudicated a bankrupt December 21st, 1867, files a petition against Daniel W. Truax, the assignee, claiming a recognition of the lien, and asking that it be first paid off from the avails of the mortgaged property.

The assignee, in his answer, alleges that the property was mortgaged to the bank to defraud the creditors of the debtor, and with the intent to give a preference, and that the petitioner having proved up the claim, secured by the mortgage, before the register, has released, abandoned, and discharged the property, taken as security therefor.

The evidence reported shows the same state of facts to exist in regard to this transaction as was shown at the time Cowles was adjudged a bankrupt, and clearly establishes two propositions, which are conclusive of the petitioner's rights.

First. That Cowles was insolvent at the time he executed the mortgage.

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Insolvency, within the meaning of the bankrupt act, when applied to traders, means inability to pay debts in the ordinary course of business, as persons carrying on trade usually do. See Bouvier's Law Dictionary, Tit. Insolvency; 13 Howard United States Supreme Court Reports, 150; 4 Cushing, 128; 3 Gray, 594. The debtor, although totally unable to meet the ordinary current expenditures necessary to enable him to carry on his business, seems to have been blind to his condition; this, however, may have arisen from the fact that he regarded himself as not absolutely broken up, and hoped that he might retrieve his affairs, and eventually pay his debts, but his own belief as to his condition cannot disprove the fact, substantiated by the strongest testimony, of his insolvency.

Second. The mortgagee had reasonable cause to believe that Cowles was insolvent, and that the mortgage was in fraud of creditors.

The testimony of Howes, the cashier, as well as that of Van Dyke, the president, is conclusive upon this point. Howes says: "Cowles told him at the time that the personal property mortgaged was subject to a lien; that judgment would go against him, and he should be subjected to great loss unless he should be able to get the money to release the property; \$1,000 was paid then, and the balance, deducting stamps, &c., *was credited to an account headed*

147 *'W. J. Van Dyke, special.'* The balance was to be paid upon *W. * J. Van Dyke's check*; it was to be paid by Cowles at Mr. Van Dyke's say so; and *was not to be paid upon Mr. Cowles's checks*. I think the credit was made to Van Dyke at my suggestion, *inasmuch as the money was not to be paid except for the purpose of manufacturing the lumber, and to make our security available.*"

The evident design on the part of the witness is apparent from this portion of his testimony. He wished to prevent, if possible, the creditors of Cowles from reaching the money. Van Dyke appears to have taken the same view of the case, and says he wished the money to be so placed that Cowles

In re James H. Hafer & Brothers.

could tell his creditors that he had none. At this time Howes had reasonable cause to believe Cowles solvent. He says, "At the time the loan was made, I considered Cowles solvent, — *that is, if his assets were well managed, that they were more than his liabilities.*"

It is unnecessary to consider this case further; it seems too plain to admit of doubt; allowing all the testimony offered by the petitioner, and rejecting that portion objected to by him, we are unable to grant the relief asked for.

Prayer of petition denied.

April 30, 1868.

U. S. DISTRICT COURT, E. D. PENNSYLVANIA.

The individual members of a bankrupt firm, in Pennsylvania, have no right to any of the partnership assets as exempt property; either under the United States bankrupt law of 1867, or the law of that state.

In re JAMES H. HAVER & BROTHERS.

THE assignee in his certificate of exempted property set apart the separate property of the bankrupts, but refused to allow them any part of the partnership assets. To this certificate exceptions were filed on behalf of the bankrupts, on the ground, that, either jointly or severally, they were entitled to the sum of \$500, and also under the act of 1849, to property to the value of \$300, or such sum as, taken with the amount of their separate property, would equal \$300.

CADWALADER, J. As I understand this case, all the separate property of each bankrupt has been allowed to him as exempted. The state exemption laws have been decided by the state courts not to apply to partnership property; and the words of the act of congress manifestly refer only to separate property of the debtor.

The exceptions are overruled.

Mr. *J. V. Darling*, for the assignee.

Mr. *Goodman*, of Berks County, for the bankrupts.

March 17, 1868.

In re George S. Mawson.

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* U. S. DISTRICT COURT, S. D. NEW YORK.

The creditors of a bankrupt opposed his discharge on the ground that he had procured the assent of a certain creditor to his discharge by a pecuniary obligation. The evidence showed that he had paid this creditor's counsel his fee for services rendered in the matter, amounting to twenty dollars, but it was also shown that this creditor had announced that he would not oppose the discharge, before anything whatever was said about the bankrupt paying his counsel fee, and that such payment was not made a condition of his withdrawing further opposition.

Held, that the burden of proof was on the creditors opposing the discharge, and the proof did not sustain the specification.

In re GEORGE S. MAWSON.

BLATCHFORD, J. Two creditors oppose the discharge of the bankrupt in this case, on like specifications. The first and third of them are too general to be triable. The second is, in substance, that the bankrupt has influenced the action of Arnold, Nusbaun & Nordlinger, creditors of his, by procuring their assent to his discharge since the filing of his petition, by a pecuniary consideration and obligation. I do not think that the evidence sustains this specification, or that the bankrupt has, either in letter or in spirit, violated any of the provisions of the bankrupt act, or been guilty of anything which is made a ground by the 29th section of the act, for withholding his discharge. The testimony given by the bankrupt on the 23d of January, 1868, on his direct examination, unexplained, seemed to support the averment that he had influenced the action of the creditors named, by a pecuniary consideration, by procuring them to agree not to further oppose his discharge, if he would pay their counsel the amount of his charge, already then incurred, for services in the matter, and which amount the bankrupt subsequently paid, it being twenty dollars. But on his cross-examination on the 13th of March, 1868, the bankrupt explained the whole matter satisfactorily; and his testimony shows that the announcement by the creditors to him, that they would not oppose his discharge, was made before anything was said between them

In re Jacob A. Koch.

and him as to paying their counsel, and at a prior interview, and was not induced by any promise on his part to pay the counsel, and was entirely independent of any such promise, and it does not appear that the suggestion of the creditors to him, at a subsequent interview, that it was right and proper that he should pay their counsel, was coupled with any intimation to him that his agreement to pay the counsel must be a condition of, or a consideration for, or a precedent obligation to, their agreement not to oppose his discharge. It is not pretended that anything was paid or agreed to be paid by the bankrupt to, or for the benefit of, these creditors, except the twenty dollars. The affirmative is on the opposing creditors to support the allegation of the specification. It was open to them to do so by the testimony of that member of the firm, alleged to have been influenced in its action by the pecuniary consideration, with whom the transaction took place. They have not adduced such testimony, and they have failed to sustain the allegation. I see nothing in the evidence to impeach the honesty and fair dealing of the bankrupt in all respects, and a discharge will be granted to him.

F. C. Nye, for the bankrupt; *E. James & J. S. Ritterband*, for the creditors.

May 12, 1868.

U. S. DISTRICT COURT, N. D. NEW YORK.

A bankrupt on his examination before the register, may be examined to show that the debt to the examining creditor was fraudulently contracted.

The bankrupt may decline to answer, if by so doing he would criminate himself. The register cannot make any binding decision, or compel a witness to answer, if he refuses.

The register must report the testimony, if required.

In re JACOB A. KOCH.

IN this case certain creditors of the bankrupt having obtained an order for his examination before Mr. Register Hus-

In re Jacob A. Koch.

bands, at Rochester, the counsel for the creditors asked the bankrupt this question :

“ State whether or not, on your purchase of goods of O. & M., in November, 1864, you made any representations to them of, or concerning, your pecuniary condition at that time ? ”

The counsel for the creditors offered to show, by the bankrupt, that this debt was fraudulently contracted by him.

The counsel for the creditor objected that it was not competent to show that any debt was fraudulently contracted ; that such fraud would merely make the discharge of the bankrupt inoperative as to the specific debt, but would not tend to defeat or prevent his discharge ; and also claimed that the bankrupt was excused from testifying on that subject.

The questions raised were certified for the opinion of the court.

“ *First.* Can a bankrupt on his examination before a register, be examined to show that the debt to the creditor making the examination, was fraudulently contracted ? ”

HALL, J. “ In disposing of this question, I proceed on the ground that the creditor has a right to examine the debtor in order to determine whether he can prove, by his testimony, and otherwise, the fraud charged. If he can, he may decline to prove his debt, but if the bankrupt denies the fraud, and the creditor cannot otherwise prove it, the creditor's interest may require him to prove his debt. I think the creditor is entitled to examine as to any matter which may be material in determining his conduct in respect to the proof of his debt, or the proceedings in bankruptcy.”

“ *Second.* If he may, is he bound to answer, or may he, as a personal privilege, decline to answer ? ”

“ Yes, if to answer would criminate himself.”

“ *Third.* Has the register authority to decide questions as to the admissibility of evidence on such examinations, subject to exceptions under Rule 17 ; or must he take the testimony subject to objections and report it to the court according to General Order 10 ? ”

In re John C. Collins.

“ I do not understand that the register can make any binding decision, or compel a witness to answer if the witness refuses.”

“ *Fourth.* If the register may so decide, and sustains an objection, how can the testimony be presented to the court, if the court should deem it proper testimony ; and if he cannot so decide must he take everything called for by counsel on the examination ? ”

“ The register should, I think, take and report the testimony if required, notwithstanding his decision.”

U. S. DISTRICT COURT, KENTUCKY.

In the examination of a bankrupt, he may not consult with his counsel before answering interrogatories, except by permission of the register.

In re JOHN C. COLLINS.

I, JAMES M. FIDLER, one of the registers of said court in bankruptcy, do hereby certify, that in the course of proceedings in said cause before me, the following question arose, pertinent to the said proceedings :

Facts. The bankrupt being duly under examination, was asked the following question by Mr. J. M. Fogle, counsel for Ben O'Neal, a creditor, namely :

“ Will you file the notes as a part of your examination ? ”

Mr. John R. Thomas, attorney for the bankrupt, asked permission of the court to consult with and advise with the bankrupt before he answers the question, in which request the bankrupt joined.

The attorney for the creditor objected to a consultation, which objection the register sustained. The attorney for the bankrupt insisted that the bankrupt had the right to consult his counsel, in relation to his answers to any, or all the interrogatories proposed to him, before answering the same, and requested that the question be certified to the judge for his decision thereon.

In re John C. Collins.

OPINION OF THE REGISTER.

This statement of facts does not, perhaps, fully justify me in submitting the first of the two following questions
154 for the decision of the judge. But, as I am anxious * to have some general rule for my guidance hereafter in examinations of bankrupts under section 26 of the bankrupt act, 1867, I do not doubt the propriety of submitting the general question.

I conceive, then, that the two following questions arise for the decision of the judge, namely:

First. May the bankrupt, during his examination, consult counsel, and have his advice, as to the answer to be given to such questions, as may be proposed to him in the course of his examination?

Second. Was the register right, in this particular case, in refusing to permit the bankrupt to consult with his counsel before answering the question proposed?

The question as to the right of the bankrupt to consult generally with his counsel is very fully discussed by Judge Lowell, United States district court, Massachusetts, in the *Matter of Edward P. Tanner*. See N. B. R. vol. 1, p. 59, *quarto*. Judge Blatchford, of the United States district court for the Southern District of New York, in the *Case of Curtis Judson*, reported on pages 82, 83, N. B. R. vol. 1, *quarto*, has adopted or rather concurred in this opinion of Judge Lowell. The decision of Judge Blatchford in the *Matter of Charles G. Patterson*, reported in N. B. R. vol. 1, p. xxxiii., also fully agrees with the opinion of Judge Lowell, above cited. It is agreed, I believe, in all of the cases cited, "that a bankrupt under examination has no right to consult with his counsel *except* when the magistrate, before whom the examination is conducted, has good cause for allowing it." Thus leaving the whole matter to the discretion of the register.

Holding, as I do, that the bankrupt, when under examination, is a witness on the witness stand, "subject to the same

In re John C. Collins.

rules and privileges as other witnesses," that the examination of the bankrupt before me at chambers must be conducted as if the cause was in progress of trial before the judge of the district court; and that to permit the bankrupt's counsel to advise him, as to the answers he should make to questions propounded to him in the course of his examination, would not only impede the case, but would make it anything but "full, fair, and searching," in that the counsel would in reality be examined instead of the bankrupt. Holding these opinions, I must, of course, hold that the bankrupt ought not to be permitted to consult with his counsel.

The second question, Was the register right, in this particular case, in refusing to permit the bankrupt to consult with his counsel?

The question proposed by the attorney for the creditor, namely: "Will you file those notes as part of your examination?" could not have possibly involved any question requiring the advice of an attorney. The question was asked in regard to notes in the bankrupt's possession, spoken of no less than three times in the course of the examination, and could have been answered without any possible detriment to the interest of the bankrupt. To have permitted a consultation here would have greatly impeded the case, and would have been a virtual admission of the right of the bankrupt and his counsel to consult upon all occasions and at their own pleasure.

It may not be improper to state that when this question was asked, the bankrupt had been on the stand under examination for about eight hours, and that the examination had been unnecessarily protracted by the verbosity of the bankrupt.

Respectfully submitted,

JAMES M. FIDLER, *Register.*

BALLARD, J. I concur with the register in the conclusions which he announces, and I approve of nearly all that is said by him in enforcing the correctness of his conclusions.

I have heretofore decided, in the *Matter of Stephen B.*

In re John C. Collins.

Leachman, a bankrupt, N. B. R. vol. 1, p. 91, *quarto*, that a bankrupt cannot be denied the benefit of counsel; that he may be attended by his counsel while under examination, and that the counsel may propound to him questions for the purpose of explaining anything already testified to, or of developing any new material fact. But it is quite a different thing to allow the examination to be suspended that the bankrupt may consult with his counsel privately. The allowing of such suspension and consultation would destroy the whole virtue of an examination. It might give the bankrupt time and opportunity to elude the effect of every examination designed to expose his deceit and falsehood. In the courts of the United States and in the courts of the states in which parties to suits are competent witnesses, I have never heard of the trial being suspended that a party on the witness stand might consult with his attorney before answering a question propounded to him.

There may be a case in which such a privilege might or should be allowed, as for example, where the examination might implicate the bankrupt in a criminal charge, or requires the disclosure of facts against which he is protected by law. But even in such case the presence of the bankrupt's counsel will generally, if not always, furnish all the protection needed without the allowing of a private consultation.

Upon the whole, I think that no rule applicable to all cases can be laid down by the court which will enable registers to determine when a bankrupt under examination ought, or ought not, to be allowed to consult counsel, independently of the particular questions and the particular circumstances under which it is put. The solution of the matter must be left mainly, if not entirely, to the good sense and judgment of the register; generally he should not allow consultation, but if a case should arise in which its allowance would not seriously delay the proceeding nor tend to defeat the effect of the examination, I think it would be a proper exercise of the discretion of the register to grant it.

Perhaps it is not proper to lay down here a rule for all

In re Ellis.

cases, and I shall not further attempt it. The action of the register in this case is clearly right. True, the question propounded does not appear to me very material, and that it seems not very important what answer shall be made to it; but no question is submitted touching the materiality of the interrogatory, nor could I, upon the facts disclosed in the certificate, decide such a question. The only questions certified relate to the right of the bankrupt to consult with his attorney before answering, and I am clearly of the opinion that there is nothing in the question propounded, nor in any of the facts certified, which shows that there was the slightest necessity for allowing a consultation in this case.

U. S. DISTRICT COURT, E. D. MISSOURI.

Attachments in state courts, brought within four months, before a commencement of proceedings in bankruptcy, are dissolved.

Moneys arising from sale, *pendente lite*, of property attached, represent the property. Moneys arising from sale of household furniture sold under process of attachment, belong to the bankrupt.

In re ELLIS.

UNDER a writ of attachment against Ellis, issuing from the St. Louis circuit court, the sheriff had levied upon personal property of the defendant, consisting of household furniture; and under an order of court, the property was sold, *pendente lite*, producing the sum of \$140. Upon proceedings in bankruptcy commenced within four months, Ellis was adjudged a bankrupt, and upon the appearance and motion of the assignee, the attachment was quashed and the proceeds of sale paid over to the assignee. The bankrupt claimed the \$140, as property exempt from the assignment in the proceedings in bankruptcy.

TREAT, J. By the proceedings in bankruptcy, the attachment of the goods and property of the bankrupt was dis-

In re Ellis.

solved. The sale under the suit in the state court, *pendente lite*, did not transmute or change the character of the property, nor give to the creditors any greater interest than they would have had, had the property remained *in specie*. The money arising from the sale, represents the property attached, and remains the property of the debtor, until disposed of by virtue of an execution upon a judgment rendered in the attachment suit. As the proceeds of the furniture sold by the sheriff have come into the hands of the assignee, the proceeds represent the property attached, and as that property is by the terms of the bankrupt act exempt from the assignment the proceeds retain the character of the property itself, as the conversion was not made by the debtor, but was made by process *in invitum*, while still belonging to the debtor. By the law of this state, some property may be liable to be attached which would be exempt from execution upon a judgment; but in this case there was no judgment, and by virtue of the proceedings in bankruptcy the property passed into the hands of the assignee, and remains subject to the provision of the bankrupt act, and not those of the attachment statute of the state.

This court will not inquire into, nor pass upon the merits of the attachment. It may be very true, that but for these proceedings in bankruptcy the plaintiff could have maintained his suit by attachment, and have applied the proceeds of this property to the payment of his debt; but with that matter, this court has nothing to do; it sits here to administer the provisions of the act of congress, and by that act, the property attached, which is now represented by the money in the hands of the assignee, received by him from the sheriff, was exempt from the assignment. It must therefore be declared that the bankrupt is entitled to this money as representing his property, the title to which did not pass to the assignee. After the commencement of the proceedings in bankruptcy all proceedings in the state court under the attachment would have been void; it ceased to have jurisdiction over the property, and the jurisdiction vested in this court.

In re Fred B. Walton et al.

The bankrupt is entitled to claim this money, as property, without waiting to learn if the assignee will be able to collect enough, from the assets assigned, to pay the expenses of the proceedings. The proceedings in this case were commenced by creditors, and the expenses are to be paid from the assets of the bankrupt, when collected, but not from property which is exempt from the assignment. The same property which is exempted from the assignment upon a petition filed by the debtor himself, is also exempted, when proceedings are commenced by the creditors.

U. S. DISTRICT COURT, E. D. MISSOURI.

Where the assignee held a store for the purpose of keeping and storing the goods of the bankrupt until they could be sold; *Held*, that the rent for such premises must be paid by the assignee, and charged as part of his expenses.

In re FRED B. WALTON et al.

THE property of the bankrupts consisted of the stock and fixtures of a drug store in a building rented from J. E. Barrow, trustee, &c. This stock had been conveyed by the bankrupts, and their conveyance had been declared fraudulent, and the grantee enjoined from interfering with the property in any way. As it was thought best for the interest of all concerned not to remove, but to sell the property on the premises, the possession of the store was retained until after the sale, when it was delivered to the landlord.

The landlord presented his petition to the register, asking that the rent of the premises from the date of the provisional injunction until the surrender of the possession, be paid by the assignee as part of his expenses.

* The petitioning creditors, through the assignee, 155 opposed the petition, claiming that the rent up to the time of the appointment of the assignee should go into the accounts of the marshal as messenger; and of that opinion was the register.

In re Sherburne.

TREAT, J. In this case it appears that this store has been used as a place for the keeping and storing of the goods of the bankrupt, until they could be sold by the assignee under the proceedings in bankruptcy; and now objection is made to payment of the rent for the time the premises were thus occupied.

The proceedings in bankruptcy give no authority to the assignee, or the creditors he represents, to use one man's property, without his consent, for the benefit of the estate of the bankrupt. The landlord does not claim to hold the assignee as assignee of the term, but merely asks compensation for the use and occupation of the premises, while they have been actually used for the benefit of the estate, and he is as much entitled to be paid as any warehouseman with whom the assignee or messenger had stored the goods. There is no necessity for dividing up the account, charging part to the expenses of the messenger, and part to those of the assignee. This rent should be paid by the assignee, and be charged as part of his expenses.

U. S. DISTRICT COURT, E. D. MISSOURI.

After an adjudication has been made, it is too late to make a motion to dismiss the proceedings and settle with the debtor. If, however, the parties desire to make a settlement they may proceed under section 43 of the bankrupt act, and have the estate wound up by trustees.

In re SHERBURNE.

UPON petition of creditors, the debtor had been adjudged a bankrupt. Motion was made for leave to dismiss proceedings and to settle with the debtor.

TREAT, J. This motion comes too late. After the adjudication all the creditors have a right to present their claims and have the estate of the debtor wound up under the proceedings in bankruptcy. If the parties desire to make a

In re William H. Langley.

settlement, they may proceed under section 43 of the act, and have the estate wound up by trustees.

Motion overruled.

U. S. DISTRICT COURT, S. D. OHIO.

A general assignment by an insolvent debtor though made for the benefit of all his creditors, is an act of bankruptcy under the bankrupt act of March 2d, 1867.

Where a creditor is about to get a judgment against his debtor, and the latter makes a general assignment under a state insolvent law for the benefit of his creditors, this is a conveyance with intent to delay, defraud, and hinder the creditor, and is an act of bankruptcy under section 39 of the bankrupt act.

It comes also under the description of a conveyance to defeat or delay the operation of the bankrupt act.

Where a debtor made an assignment under a state insolvent law, and a creditor applied to the state court to have the security of the assignees increased, this was not such an assent to the proceedings as estopped him from claiming that the assignment was an act of bankruptcy. 8 P. R. 476

A debtor made an assignment under the insolvent law of Ohio, on May 25, 1867, and under it, a state court took cognizance of the matter. On July 17th, a petition in bankruptcy was filed by a creditor. *Held*, that as to this matter the bankrupt act of 1867 was in force on May 25th, and the United States court could rightfully take jurisdiction of the whole matter under the petition filed in July.

In re WILLIAM H. LANGLEY.

THIS was a petition in bankruptcy, under the act of 1867, praying that Wm. H. Langley be declared a bankrupt. The only distinct act of bankruptcy alleged in the petition is that Langley, then being largely insolvent, on the 25th day of May, 1867, executed an assignment of all his property to two assignees, named in trust for the benefit of all his creditors. This assignment is alleged to be fraudulent and void; as intended, *first*, to delay, defraud, or hinder his creditors; *second*, to defeat or delay the operation of the bankrupt law.

Langley filed an answer, admitting the assignment of his property as alleged in the petition, and his utter insolvency at the date of its execution; but denied, explicitly, that it was fraudulent, either in fact or in law, or that it was in-

In re William H. Langley.

tended to defeat or delay the operation of the bankrupt act. He averred that his object was to prevent the petitioning creditor, Perry, from obtaining an unjust preference over other creditors, and to secure an equal distribution of his property among all his creditors.

The facts were, that Langley had been engaged in business at Gallipolis; that in the spring of 1866 he became embarrassed in his pecuniary affairs; that prior to the 25th of May, 1867,—the date of the assignment,—with an admission of his hopeless insolvency, he assigned his entire property, in trust for the benefit of all his creditors; that this assignment was filed in the probate court of Gallia County, and put on record on the said 25th of May, and an order made by the probate judge, for security by the assignees, pursuant to the statute of Ohio on that subject; that the assignees took possession of the property, and were proceeding to administer the same; and that on the 17th of July, the said Perry filed his petition in bankruptcy, embracing a prayer for an order restraining the assignee from any further interference with the property of Langley under said assignment; which prayer was granted by this court; and the assignees have suspended all further proceedings, awaiting the judgment of the court upon the question whether the act of bankruptcy charged in the petition was or was not in violation of the bankrupt law.

Nash & T. D. Lincoln, for petitioning creditor.

Coffin, for Langley.

LEAVITT, J. The grounds of opposition to a decree of bankruptcy against Langley, comprehensively stated, are: *First.* That the assignment by him on the 25th day of May, was not an act of bankruptcy within the purview of the statute. *Second.* If an act of bankruptcy, the petitioning creditor, Perry, is estopped from urging or relying upon it, by reason of his implied assent to the assignment. *Third.* That at the date of the assignment (the 25th of May), the bankrupt act of the 2d of March, 1867, was not in force, except for a special and limited purpose; and that the pro-

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bate court of Gallia County, having rightfully obtained jurisdiction of the assignment under the statute of Ohio, on the 25th of May, and prior to the bankrupt act taking full effect, is entitled to retain it; and that the assignees are fully empowered to act under it, and execute its provisions, irrespective of the bankrupt act.

The first question, therefore, is, whether the assignment by Langley is an act of bankruptcy within the meaning of the statute, upon the hypothesis that the law was then in force, as applicable to the transactions involved in the case.

It is claimed by the counsel for the petitioning creditor, that the assignment is void; *first*, as being executed by Langley, with an actual, fraudulent intent; *second*, that being for his entire property, it is presumptively fraudulent, under the operation of the bankrupt act, and therefore void; and *third*, that it is void as being with an intent to defeat and delay the operation of that act.

As to the first inquiry suggested, namely, whether the assignment was executed with a positive fraudulent intent, it is perhaps not important to inquire. The consideration of the other points stated, as to the legal effect of the assignment, under the provisions of the bankrupt act, will be decisive of the question before the court. If, subject to the imputation of legal, or constructive fraud, as in conflict with the act, the effect as to its validity is the same as if a fraud in fact were proved.

The question involves the construction of the 39th section of the bankrupt law, in connection with the 35th, which defines what shall constitute acts of bankruptcy. And so far as the 39th section relates to the transfer, sale, or conveyance of property by one who is insolvent, it is declared to be an act of bankruptcy when made. *First*. "With intent to delay, defraud, or hinder creditors." *Second*. "With intent to give a preference to one or more of his creditors, or to any person, or persons, who are, or may be liable for him, as indorsers, bail, sureties, or otherwise." *Third*. "With intent . . . to defeat or delay the operation of this act."

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First. Was the assignment by Langley intended to delay, defraud, or hinder a creditor, or creditors? The argument in favor of the legality and fairness of the assignment is, that being for the equal benefit of all his creditors, fraud cannot be presumed. Now it is true that an assignment or conveyance of all his property by a bankrupt, for the benefit of his creditors generally, unless with some one of the intents specified in the 39th section above noticed, is not declared to be an act of bankruptcy. Yet it is clear that such an assignment is in contravention of the spirit and policy of the bankrupt law, even when made in good faith. The intention of that law clearly was, that when a failing debtor was conscious of his inability to prosecute his business and pay his debts, he should at once subject his property to such a disposition as the bankrupt act has provided for. The property then becomes a sacred trust for the benefit of his creditors, who have a right to insist that it shall be administered, not according to the wish or preference of the insolvent, or in accordance with the insolvent laws of a state, but according to the provisions of the national bankrupt act. Indeed, it has been the settled doctrine in the United States, under any bankrupt law that has been passed, that when congress had called into exercise the clear constitutional grant of power to pass a uniform bankrupt law, the jurisdiction and legislation of the state as to the settlement of insolvent estates, was wholly suspended, to be resumed only when the national law ceased to be in force. This doctrine is not controverted, and it seems hardly necessary to refer to the cases which sustain it.

In England the decisions have been uniform from the time of Lord Mansfield, that an assignment of all his property, by an insolvent debtor, for the benefit of all his creditors, was an act of bankruptcy, even where no actual fraud was intended. Deacon on Bankruptcy, 72, 73; Griffith on Bankruptcy, 107, 119, 120.

The same doctrine has been settled in this country under the bankrupt act of August, 1841. *McLean, Assignee, v.*

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Meline et al. 3 McLean R. 190 ; also, *McLean, Assignee, v. Johnson et al.* 3 McLean R. 202 ; *Shawhan et al. v. Wherritt*, 7 How. 627. And it is understood from newspaper reports, that the same doctrine has been uniformly held by all the judges of the United States, before whom the question has been presented, under the recent act of the 2d of March, 1867. And if there was any doubt upon this question, under the 39th section of this law, it would seem to be removed by reference to a clause in the 35th section of the act. The 35th section does not define acts of bankruptcy, but declares what conveyances or transfers of property by a bankrupt shall be deemed void, and vest no title, as against the assignee in bankruptcy. This clause is in these words : " And if such [any] sale, assignment, transfer, or conveyance, is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud." This clause throws light upon the intention of the legislature in the enactment of the 39th section, and shows that any assignment or transfer of property by a failing debtor, not in the usual and ordinary course of business, is not only void, but evidence of fraud. Now it cannot be claimed that an assignment of all a debtor's property, for any purpose, is in the usual and ordinary line of business. Its effect is to * put a stop to all business, by 156 disposing of all the means by which it can be carried on. And this is one of the reasons given by the English courts why a general assignment of all a debtor's property is, *per se*, an act of bankruptcy.

Second. But whether the assignment is void, on the ground of presumptive fraud, it seems clear it is within the clause of the 39th section of the act, declaring any assignment, or transfer of property, by one in contemplation of bankruptcy, with intent " to delay, defraud, or hinder his creditors," shall be an act of bankruptcy. There would seem to be no doubt, from the facts in evidence, that this intent was in the mind of Langley in making this assignment. Indeed, he avers in his answer that his purpose was to prevent the petitioning

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creditor, Perry, from obtaining a priority over other creditors. This was an intent, within the meaning of the statute, to delay or hinder a creditor from obtaining his legal rights. Perry had sued Langley in the common pleas court of Gallia County for a debt of some \$5,000, some time prior to the 25th of May, 1867, on which, by the rules of the court, he would be entitled to a judgment, and did obtain a judgment on the 1st of June, which, under the statute of Ohio, took effect, and was a lien, from the first day of the term, which was the 27th of May. There can be no doubt that Perry had a right to take all lawful means to secure his debt. No censure could attach to him for doing so, though it might give him an advantage over other creditors. All the creditors had the same right, and all who were thus vigilant would be entitled to all the legal benefits of their diligence. He was defeated and delayed in this, by the act of Langley in assigning all his property, and thus putting it beyond the reach of an execution. This clearly brings the assignment within the words of the statute as an act of bankruptcy. Langley avers in his answer, that one object in view, in making the assignment, was to prevent Perry from obtaining a preference over other creditors; and this, he assumes, was a meritorious purpose. But the law does not so view it. In its effect, it was delaying and hindering a creditor in a legal effort to secure his debt.

Third. But there is still another ground, on which the assignment must be adjudged to be an act of bankruptcy. It was clearly within the provision of the 39th section of the bankrupt act, declaring in substance that any conveyance, or transfer of property, with intent "to defeat or delay the operation of the act," to be an act of bankruptcy. The facts lead, with great certainty, to the conclusion that Langley must have intended to withdraw his property from the operation of the statute, and administer it through trustees of his own selection, and subject to his influence, and not by assignees selected by the creditors. If such was the design of Langley, even if honestly intended, the assignment, in its effect, was

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to defeat or delay the operation of the law. The bankrupt act was approved on the 2d of March, 1867, to take effect, as to the appointment of officers, and the preparation of rules of proceeding, from that day, and for other purposes, not until the 1st day of June following. The act, immediately after its approval, was published in all the leading newspapers of the country, and its provisions well known to the reading public. Langley, on the 25th of May, made the assignment in question. He had only to wait five days till the bankrupt act would be in full operation, and the way opened for filing his petition, and obtaining an adjudication in bankruptcy; and thus subjecting his property to distribution according to the just requirements of the act. Practically, the assignment delayed or defeated the operation of the law, and, as I think, was so intended by Langley. This was depriving the creditors of a legal right under the statute, and was clearly in contradiction of its spirit and letter. And the fact proved, that a few days after the assignment, Langley made a formal proposition to his creditors to compromise with them, by giving his promissory notes for forty cents on the dollar of his indebtedness, payable in instalments, within five years, may at least justify the suspicion, that the assignment was intended to facilitate such a compromise.

This leads me to the consideration of the second ground of objection to a decree of bankruptcy against Langley, namely; that the petitioning creditor, Perry, is estopped from urging or relying upon the assignment as an act of bankruptcy, for the reason that he assented to it, and cannot now in good faith, object to it. The well known doctrine of estoppel, is undoubtedly applicable in such a case, if the facts justify its application. It would clearly be in violation of a rule of good morals, as well as of law, that one should give his assent and approval to an act, and afterwards, for his own advantage, denounce the act as illegal and immoral. If the proof was that Perry had advised the making of the assignment, or after its execution, had expressly given his assent to it, as a creditor of Langley, he would have been precluded

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from insisting on it as an act of bankruptcy, and could not have maintained a standing in this court, as a petitioning creditor. But there is no evidence placing him in this position. The only fact relied on is, that, after the assignment had been made, and assignees had been approved of by the probate judge of Gallia County, and a bond ordered and given by the assignees, in the very inadequate sum of \$15,000 (the assigned estate being in value about \$175,000), Perry applied to the court to have the penalty increased, which was done by order of the court. This was clearly no approval of, or assent to, the assignment, and this exception to the petition must be overruled.

There yet remains for consideration the third objection to a decree of bankruptcy against Langley. This, as before stated, is in substance that, on the 25th day of May, 1867, the date of the assignment to the trustees, the bankrupt act, as to this transaction, was not in force; that the statute of Ohio, legalizing such assignments, was then operative; and the probate court, having rightfully acquired jurisdiction of the proceeding, had authority to retain it until it was ended; and that the jurisdiction of that court was not affected by the bankrupt act, which did not take full effect until the 1st of June.

This point has been strenuously insisted on by the able counsel representing Langley, and I am free to confess that, as a first impression, it seemed plausible, if not unanswerable. Upon full reflection I am satisfied his argument is untenable, and I will state very briefly the reasons which have led to this conclusion.

The 50th section of the act of March 2d, 1867, provides that the act as to the appointment of officers and the promulgation of rules and general orders, shall take effect from its approval, "provided, that no petition or other proceeding under this act shall be filed, received, or commenced, before the 1st day of June, A. D. 1867." The phraseology of this proviso is somewhat peculiar and significant. It does not declare that the statute, as to all matters not included in the

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preceding part of the section, shall not take effect till the 1st day of June, but merely that no proceedings shall be instituted under the act before that date. Its effect, therefore, is, by a fair construction, that while it suspends the right to proceed until the day named, it was the intention of the law-makers that as to the body of its provisions, it should take effect from its passage. If this were not the intention, why provide specially that no petition should be filed, or other proceeding had before the 1st of June? If it had been intended to postpone the operation of the entire act, except for the specific purpose mentioned in the beginning of the section, until the day named, it may be pertinently asked why it was not so expressed in clear terms? Not being so expressed, and the words used not admitting of such a construction, the conclusion is irresistible that it was not intended that the main provisions of the act should be a dead letter until the 1st of June. On the contrary, it would seem to be clear that it was intended that these should be operative from the day the act was approved. The reason for the postponement of the law, as to proceedings under it, is well known. The law had made it the duty of the supreme court to prescribe orders and rules in bankruptcy; and these, from the pressure of other duties, could not be prepared before the 1st of June. For the purpose of insuring uniformity in the proceedings, it became necessary to suspend the right of petitioning until that day; but, for all other purposes, it was operative from its passage. And it is most obvious that any other construction of the section referred to, would have had a very decided effect in defeating the object of the statute. If all transactions occurring prior to the 1st of June, though plainly in conflict with the provisions of the bankrupt act, and involving gross frauds, were withdrawn from its operation, and virtually legalized, great facilities would have been afforded for the evasion of the salutary restrictions and prohibitions of the statute. And it can hardly be imputed to congress that such a result could have been intended.

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But, aside from the 50th section of the act, there are other evidences that it was intended the statute should take effect, in its main provisions, from its passage. In the beginning of the 39th section it is provided "that any person residing and owing debts as aforesaid, who, *after the passage of this act,*" shall commit any of the numerous acts of bankruptcy specified in the section, may be proceeded against in bankruptcy. The words are not, after this act shall take effect, but after the passage of the act, which means plainly, after the 2d of March, the date of the approval of the act. And this is not within the category of retroactive laws, as its operation is upon future transactions, and not those that are past.

In addition to this, light is cast upon the question under review by the 35th section of the statute. The purpose of this section is to point out under what circumstances conveyances and transfers of property, by one in contemplation of bankruptcy, shall be deemed fraudulent and void; and it prescribes the duties and powers of assignees in bankruptcy, in proceedings to set aside such conveyances and transfers, and for the recovery of property thus fraudulently sold, or disposed of. In the beginning of the section it is provided "that if any person being insolvent, or in contemplation of insolvency, *within four months* before the filing of the petition, by or against him, shall dispose of his property in the way specified, his acts shall be fraudulent and void, and the property disposed of may be recovered by his assignee in bankruptcy." Here, it will be observed, the limitation as to time is, *four months* prior to the filing of the petition. And any act within the purview of the section, committed within that time, is declared to be fraudulent and void. Now, in this case, the assignment by Langley was on the 25th of May, and the petition in bankruptcy was filed the 17th of July following; and, as less than four months intervened, the assignment is within the operation of the 35th section.

If, therefore, there was a doubt as to the true construction of the 50th section of the act, the reference to the 35th and 39th sections shows conclusively that the statute extends to

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transactions occurring prior to the 1st of June, 1867, and that they are proper subjects of jurisdiction under the bankrupt law.

Now it is not denied by counsel that the bankrupt act of the 2d of March, 1867, so far as it defines what are acts of bankruptcy, and points out the mode * of pro- 157 ceedings, supersedes all insolvent laws of the state.

I have before referred to this well settled doctrine, and will only cite some of the authorities by which it is sustained: *Ex parte Eames*, 2 Story R. 324; *Judd v. Ives*, 4 Met. 401; 4 Wheat. 195; 5 Ib. 22; and also a very learned opinion by Judge Williams, of the district court of Alleghany County, Pa., in *Commonwealth v. O'Hara*, 6 Am. Law Reg. N. S. 765; and N. B. R. vol. 1, p. xix.

It results conclusively, that if the provisions of the bankrupt act were in force on the 25th of May, 1867, the date of the assignment, and that assignment was within the scope and intent of the law, and as an act of bankruptcy, altogether null and void, the probate court of Gallia County had no jurisdiction of the assignment, and the acts of that court in regard to it are wholly invalid. And no argument is needed to prove that no court can legitimately obtain jurisdiction by any act against law, and inherently void. The argument, therefore, that the Gallia County probate court, having obtained jurisdiction under the state law, is entitled to retain it to the end of the proceeding, has no force or application. That court had no authority to act in the matter of the assignment, as the jurisdiction of this court was paramount and exclusive. There is, therefore, no conflict of jurisdiction.

A decree in bankruptcy must be entered; and the usual order for a warrant is directed to be made. As a matter of course, the motion to dissolve the injunction heretofore granted, is overruled.

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U. S. DISTRICT COURT, N. D. MISSISSIPPI.

An attachment of a bankrupt's goods, under process in a state court, within four months before bankruptcy, is defeated by the provisions of section 14 of the bankrupt act.

Demurrer overruled, and the defendant allowed fifteen days in which to answer.

G. W. PENNINGTON, *Assignee in bankruptcy of* C. D. BRYAN,
v. J. H. LOWENSTEIN et al.

HILL J. The questions presented to the court arise upon the defendant's demurrer to complainant's bill. The bill, in substance, states that on the 24th day of October, 1867, said Lowenstein & Brothers sued out of the circuit court of Monroe County an attachment against said Bryan, which was, by the sheriff of said county, on the next day, levied upon a stock of goods, as the property of said Bryan, and which goods were afterwards sold by the sheriff, who now holds the proceeds; that said attachment suit remains undetermined; that, on the 8th day of November, 1867, said Bryan filed in this court his petition praying to be declared a bankrupt, and was, on the 6th day of December thereafter, so declared; that, on the 3d day of February, 1868, complainant was duly appointed assignee of said estate, and received an assignment thereof.

The prayer of the bill is, that the sheriff be enjoined from paying said proceeds to the plaintiffs in said attachment, and that he be required to pay the same over to complainant, to be applied as this court may direct.

The defendants, by their demurrer, admit the facts as stated to be true; but insist that, by the levy of the attachment the title to the goods became vested in the sheriff, for the payment of such judgment as might thereafter be obtained in said suit; that the state court, having obtained jurisdiction thereof, cannot be ousted or interfered with by this court. And whether this is so or not, is the only question now to be determined.

The 14th section of the bankrupt act of 1867, provides "that the assignment therein provided shall relate back to

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the commencement of proceedings in bankruptcy, and by operation of law shall vest in the assignee all the title and interest which the bankrupt then had to his estate, real and personal, although the same may then have been attached by *mesne process* as the property of the debtor, and shall dissolve any such attachment made within four months next before the commencement of such proceedings."

If this provision of the act embraces the attachment and proceedings in this cause, it is clear that the demurrer should be overruled, and the prayer of the complainant granted.

It is insisted by complainant's counsel that it is so embraced, and by defendant's counsel that it is not.

The determination of this question depends upon the construction which should be given to the term *mesne process*, and this depends upon the intention of congress in the passage of the law. The object of the law was, that, when an act of bankruptcy was committed, no matter by what means, all the creditors of the bankrupt should share equally, according to their respective rights, in the bankrupt's estate. To give the term its restricted meaning, would most clearly defeat that object. Such being the case, the next emergency is, has the term a more general application, so that it can be applied to secure the object of the law? Upon this point there is no difficulty.

Mr. Blackstone, in his Commentaries, at page 280, says "that *mesne process* is sometimes put in contradistinction to final process, or process of execution, and then signifies all such process as intervenes between the commencement and end of the suit." The term is used in the same sense repeatedly in our own Code, and it is in that sense that the term is most usually used in the courts. Were there any doubts about this being the proper construction to be given the term, as applied to this case, it would be greatly aided by reference to the present English bankrupt law, and from which our present act was mainly taken. By that law it is provided "that to preserve the lien of the attachment the levy and sale must be made before the act of bankruptcy,

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and that the knowledge by the party for whose benefit it was made, of a former act of bankruptcy, renders the proceeding invalid." With but one exception every cause for attachment, under the laws of this state, is by this act declared to be an *act* of bankruptcy, and some one of which must have been the cause alleged for the issuance of this attachment. The act of 1841 contained no provision similar to that in the 14th section of the bankrupt act of 1867; so that the authorities cited by counsel have no application to this case. The power of this court to restrain litigants in the state courts when it is necessary to give effect to the bankrupt law, and its jurisdiction of the bankrupt, his estate, and all persons interested therein, is too well settled upon principle and authority to be successfully controverted.

After a careful examination of the question, I am constrained to say, in the language of Mr. James, in his valuable treatise on bankruptcy, at page 45, that "the effect of the 14th section of the act of 1867, is absolutely to defeat all attachments issued against the property of the bankrupt, made within four months before the bankruptcy." Such being the case, the demurrer will be overruled, and the defendants allowed fifteen days in which to answer.

U. S. DISTRICT COURT, N. D. MISSISSIPPI.

A levy was made by the sheriff on certain goods of bankrupt after the date of filing his petition in bankruptcy: *Held*, that the title being vested in him, the assignee must make sale and deposit proceeds of such goods subject to whatever claims may be determined by the court to be upon them.

G. W. PENNINGTON, *Assignee in bankruptcy of* JAMES F. STEWART, *v.* SALE & PHELAN *et al.*

THE questions now presented arise upon defendant's demurrer to complainant's bill. The bill in substance states that on the 27th day of May, 1867, said Sale & Phelan ob-

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tained, in the circuit court of Monroe County, judgment against said Stewart for the sum of \$730.77, upon which execution was issued and returned, *nulla bona*; that on the 11th October thereafter, an alias executed thereon was issued, and on the 11th of January, 1868, levied on a lot of seed cotton, and on the 14th on two mules, and on the 24th on four bales of other cotton, as the property of Stewart, and that the cotton first levied on and the mules were sold by the sheriff, on the 25th January, 1868, and the proceeds first applied to the payment of an elder judgment, and the remainder, \$227.97, applied to said execution. That the last of the cotton levied upon is still in the hands of the sheriff, who has advertised the same for sale. That on the 14th of October, 1867, said Stewart filed in this court his petition praying to be declared a bankrupt, and was, on the 6th day of December, so declared. Complainant files with his bill, as an exhibit, a copy of the assignment of the register of the estate of said bankrupt, dated the 3d day of February, 1868. The bill prays that the sheriff be enjoined from the sale of the last mentioned cotton, and that it be turned over to complainant to be sold, and the proceeds applied as this court may direct.

The defendants, by their demurrer admit these statements as true, but insist that said judgment was a lien on the cotton; that the title never vested in the complainant; but the state court, by the judgment, obtained complete jurisdiction over the cotton and the subject matter, which cannot be ousted or interfered with by this court.

Two questions are presented: *First*. Is the judgment stated a lien upon the cotton mentioned? *Second*. If such a lien, by what process and in what form is it to be enforced? The answer to the first question depends upon whether or not the judgment was enrolled according to the provisions of act 260, chap. 61, Revised Code of this state. Act 261 of the same chapter provides "that all judgments and decrees so enrolled shall be and remain a lien upon the estate real and personal, of the defendant, situated in the county where the enrol-

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ment is made, and not otherwise." The bill does not state whether the judgment is, or is not, enrolled.

The answer to the second question will be found in section 1 of the bankrupt act of 1867, which, among other powers conferred upon the district courts, makes the following provision: "And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor, or creditors, who shall claim any debt or demand under bankruptcy; to the collection of all assets of the bankrupt, to the ascertainment and liquidation of the liens, and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties, and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors."

In all cases of liens where the party holding by themselves, or trustees, are in a condition to enforce the lien without the aid of the courts, or their officers, this court will interfere only upon a showing that the interest of the general creditors requires it.

The filing of the petition by the bankrupt was the act of bankruptcy; the assignment related back to the date of filing; from that time the estate of the bankrupt was transferred to the jurisdiction of this court, subject to whatever incumbrances might then have attached to it. Had the levy then been made, both the possession and title for the purpose of satisfying the judgment would have been vested in the sheriff, who, as trustee, could have gone on and made the sale as in case of the death of a defendant. It may well be questioned whether the bankruptcy of the defendant does

not work his civil death and produce the same results

158 as to his estate, if so, the right to levy after the *act of bankruptcy, would cease; but the levy not having been made at the date of the bankruptcy, the title by operation of law is vested in the assignee, who must make the sale, and deposit the proceeds, subject to whatever claims may be upon it, as hereafter determined by this court. The object and purpose of the bankrupt act of 1867 being to confer

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upon the district courts, as courts in bankruptcy, full and complete jurisdiction of the bankrupt and his estate, with all parties interested therein; such was repeatedly declared by the courts, federal and state, to have been the case with regard to the bankrupt act of 1841. The powers granted under the present act are in many particulars more extensive than under the former one. Whilst this court does not claim the power to restrain the state courts, it does claim the power to restrain parties litigant in the other courts, when it becomes necessary to give force and effect to the jurisdiction and powers conferred upon it under this law, and this position is sustained by numerous decisions of both the national and state courts, under the former law.

For the reasons stated, the demurrer will be overruled, and the defendants allowed fifteen days in which to answer.

U. S. DISTRICT COURT, NEW JERSEY.

The creation of a debt by fraud is not a ground for refusing a discharge to a bankrupt.

A specification stating that a debt had been created by fraud is not a good specification, and will be stricken out on motion.

A bankrupt cannot be examined for the purpose of showing that the debt was created by fraud.

A fraudulent conveyance made, or a fraudulent preference given, before the passage of the bankrupt act, are neither of them good grounds upon which to oppose a discharge. Such a conveyance or preference does not come within the terms of section 29th of said act, and a specification alleging such a conveyance or preference will be stricken out on motion.

The difference explained between the meaning of the following phrases in section 29th, namely: "*since* the passage of this act," and "*subsequently* to the passage of this act."

By the term "fraudulent preference," used in item nine of section 29th, is meant only, a preference in fraud of the bankrupt act, that is, contrary to its provisions. 19 B. R. 7

In re ISAAC ROSENFELD.

FIELD, J. There are two questions, the determination of which will dispose of all the exceptions taken to the specifications filed in this case.

In re Isaac Rosenfield.

First. Is the creation of a debt by fraud, a good ground upon which to oppose the discharge of a bankrupt?

The 33d section of the act provides: "That no debt created by the fraud of the bankrupt, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt." Why, then, should a creditor be allowed to object to the discharge of a bankrupt, on the ground that the debt due to him was created by fraud? So far as he is concerned, the bankrupt is not discharged at all. Such creditor is in fact a favored creditor; like other creditors, he is entitled to receive a dividend; but this dividend, instead of being a payment in full, is only a payment on account, and the bankrupt is forever liable for the balance of the debt; and this balance is much more likely to be paid, if the bankrupt is discharged from the payment of all his other debts, than if he was not discharged at all. Such a creditor, therefore, has not only no right to oppose the discharge, but it is not his interest to do so. This no doubt is the reason why the fact that the debt was created by fraud, is not, by the 29th section, made a ground for refusing a discharge.

If the question, therefore, had not before arisen, I should have had little or no doubt with regard to it. But it is not a new question. It has been before Judge Blatchford, in the Southern District of New York, upon two occasions: once in *Rathbone's case*, N. B. R. vol. 1, p. 65, *quarto*; and again in the *Case of Darius Tallman*, N. B. R. vol. 1, p. 122, *quarto*. In the first case, he held, that a specification, stating that the debt had been created by fraud, was not a good specification; and in the second, that a register was right in refusing to allow a bankrupt to be examined for the purpose of showing that the debt was created by fraud. I concur with him entirely in his opinion.

Second. The second question is one about which there is, I will not say more doubt, but perhaps more room for discussion; and as the counsel for the creditors have urged their views with so much force and earnestness, I have felt bound

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to give them a very careful consideration. Is a fraudulent conveyance made before the passage of the bankrupt act, a good ground on which to oppose a discharge?

The 29th section contains an enumeration of seventeen distinct acts, any one of which, if shown to have been committed by the bankrupt, is an absolute bar to his discharge. These acts are in the nature of offences, created and defined by the bankrupt law, the penalty for the commission of which by the bankrupt, is, the forfeiture of his right to a discharge. Now, suppose there was no limitation whatever in the law itself, as to the time within which these acts must have taken place, or been performed. Would it not have been necessary to aver, and prove, that they had been committed since the passage of the law, in order to deprive the bankrupt of his right to a discharge? To have held that acts, committed before its passage, were offences against the bankrupt law, would have been to make that law, if not an *ex post facto* law, in the strict sense of the term, yet at least a law retroactive or retrospective in its character. Now, although to give a law a retrospective operation, may not render it absolutely unconstitutional, yet as a general rule, it is a very objectionable feature in any law; and an intention upon the part of the legislature to give a law such a character, will never be presumed, in the absence of express words to that effect.

But it is said, there is a limitation as to time expressly annexed to some of the acts enumerated in the 29th section, that limitation being expressed by the words "since the passage of this act," and as this limitation is not annexed to other acts, therefore, upon the principle "*expressio unius est exclusio alterius*," it is to be presumed that with regard to these other acts, it is sufficient to show that they were committed at any time, whether before, or since, the passage of the law. If all the provisions of the section are, upon general principles, subject to the restriction that the acts must have been done after the passage of the law, why in express terms impose that restriction on two only out of the seventeen?

In re Isaac Rosenfield.

But, from a close examination of the whole section, I think it will appear, that the maxim alluded to has no application in reference to it. To the first four items, no limitation as to time is annexed ; but then they are acts which could only be committed after proceedings in bankruptcy had been commenced. The fifth item has a limitation expressed by the words, "within four months before the commencement of such proceedings." But this limitation of four months was meant to be confined to the fifth item alone. It became necessary, therefore, to annex to the following items a different limitation. The sixth item, accordingly, begins with these words : "or if since the passage of this act." Now, if it was intended that the limitation should apply to all the following items, from the sixth to the fourteenth, it certainly was not necessary to repeat it at the beginning of each clause. The 39th section, which contains an enumeration of what are deemed acts of bankruptcy, has the same limitation as to time, expressed by the words, "after the passage of this act," annexed to the first act described ; and there can be no doubt that it is meant to extend to all the other acts thereon enumerated ; but it was not thought necessary to repeat it at the beginning of each subsequent clause. But it is said the fourteenth item of the 29th section has a limitation expressly annexed to it, substantially the same as that annexed to the sixth item ; and if the limitation contained in the sixth item extends to all the intervening items without being repeated, why would it not also have extended to the fourteenth item ?

The fact that the very same limitation as that contained in the sixth item, is expressly annexed to the fourteenth, shows that it was not intended to apply to the intervening items. But it will be perceived, that the language in which the limitation is expressed in the fourteenth item, is slightly different from that used in the sixth. Instead of being "*since* the passage of this act," it is "*subsequently* to the passage of this act." Now let us see if we cannot account for this difference in phraseology, and thus explain why it was deemed necessary to repeat the limitation in the fourteenth item,

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slightly varied in form. The change consists in substituting *subsequently* for "*since*." These words, although similar in meaning, are not identical. "Since," according to Worcester, means, "from the time of ;" and its meaning is illustrated by a line from Milton :

"He *since* the morning hour set out from Heaven."

And Webster in his dictionary says, "the proper signification of *since* is, after, and its appropriate sense includes the *whole period* between an event and the present time. "I have not seen my brother since January." "Subsequently," according to the same authorities, means, "at a later time," or "afterwards," that is, at any time afterwards.

Now, the act described in the fourteenth item, is that of a merchant or tradesman, not keeping * proper 162 books of account. If the limitation had been expressed by the words, "*since* the passage of this act," it might have been said that to bring a merchant or tradesman within its provisions, he must, *during the whole period* from the passage of the act, have neglected to keep proper books of account. Whereas, by using the word "subsequently," it would be sufficient to show that he had, at any time after the passage of the act, neglected to keep proper books of account. And this, no doubt, is what was intended by the provision. We see, therefore, why it was that, "in the fourteenth item," it was thought necessary to repeat the limitation annexed to the sixth item, but to express it in a somewhat different form. The fact, then, of such repetition in the fourteenth item, does not prove that the limitation annexed to the sixth item was not meant to extend to all the intervening sections.

But let us see what would be the result of the construction contended for by the counsel for the creditors.

The act described in the sixth item, to which the limitation as to time is expressly annexed, is, the act of destroying, mutilating, altering, or falsifying, books, documents, papers, writings, or securities. This is certainly one of the grossest frauds that could possibly be committed by a bankrupt, and

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if this must be committed since the passage of the act, in order to make it a ground upon which to refuse a discharge, it would be difficult to imagine upon what possible principle the same limitation was not extended to the acts described in the following items. A construction involving such a result certainly cannot be the true construction. At all events, it ought not to be adopted unless it is imperatively required by the language of the act.

But again, by the construction contended for, if there is no limitation as to time with regard to the tenth item, there is none with regard to the ninth. The act described in the ninth item is, a "fraudulent preference contrary to the provisions of this act." Now, could it have been intended, that the mere fact of a bankrupt having, at any time before the passing of the act, given a preference to one or more of his creditors, would be a good ground upon which to oppose his discharge? By the term "fraudulent preference," of course, is meant only, a preference in fraud of the bankrupt act: that is, contrary to its provisions. But in New Jersey at least, before the passage of the bankrupt act, a debtor had a perfect right to prefer one creditor to another. This has been repeatedly decided by the supreme court of the state. *Hendricks v. Mount*, 3 South, 738; *Tilton v. Britton*, 4 Halst. 120. Nay, it has been held, that it was the duty of the debtor, under certain circumstances, to prefer one creditor to another. It cannot be imagined for one moment, that the framers of the law meant, that an act committed before its passage, and which was perfectly lawful at the time it was done, would be a ground upon which to refuse a bankrupt his discharge.

Upon the whole, then, I am clearly of the opinion, that either the limitation as to time annexed to the sixth item, was intended to apply to all the intervening items between that and the fourteenth, or that these intervening items, having no limitation as to time annexed to them, must be construed in reference to the principle applicable to laws generally, which is, that they take effect only from the time of the passage.

In re Louis Meyers.

This is the view taken of the 39th section by those who have written upon the bankrupt act. James, after speaking of the fifth item says, "Next follows a series of misconduct or offences, which, to affect the bankrupt's order of discharge, must have been committed by him since the passage of the act. James Bankrupt Law, 129. See also Bankrupt Law by Avery & Hobbs, 214, 220.

This also would seem to be the view taken by Judge Blatchford, in *Rathbone's case*, before referred to. One of the specifications was, fraud in an assignment made in 1854. It was objected to as being too vague. The objection was sustained, and leave granted to file new specifications. The specifications were then made more full and particular, and when the matter came up again, the judge said: "The second and third specifications relate solely to transactions by the bankrupt under and in regard to an assignment made by him in 1854. They do not set forth any ground that is covered by section 29 of the act."

All the exceptions taken to the specifications filed in this case are therefore sustained.

U. S. DISTRICT COURT, S. D. NEW YORK.

The trust resulting in favor of creditors, in real estate held by the wife of a bankrupt, inures as assets to his assignee, when such property was purchased by the bankrupt, prior to his bankruptcy, and paid for with his own money in fraud of his creditors.

Creditors waive all right of action against the bankrupt, on either their judgments or the original indebtedness, by proving their debts in bankruptcy, and all proceedings in such suits must be stayed under the 21st section of the bankrupt act.

In re LOUIS MEYERS.

On the 8th of June, 1865, Martin Maas recovered a judgment, in the supreme court of New York, against the bankrupt and one Sondheim, as joint debtors, for \$1,130.70. It

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was duly docketed and execution was issued on it and returned unsatisfied. It is now wholly due, with interest from January 8, 1866. It was founded on two promissory notes of the debtors, one made July 18, 1860, at eight months, for \$679.01, and one made August 25, 1860, at eight months, for \$322.48, and an account for \$9.62 for goods sold. The consideration for the notes and account was goods sold to the debtors by Maas in July, August, and September, 1860.

On the 9th of April, 1866, Bache, Ulman & Bach recovered a judgment in the supreme court of New York against the bankrupt and Sondheim, as joint debtors, for \$1,167.08. It was duly docketed, and execution was issued on it and returned unsatisfied, and it is now wholly due, with interest from its recovery. It was founded on a promissory note of the debtors, made August 10, 1860, at eight months, for \$781.56. The consideration for the note was goods sold to the debtors by Bache, Ulman & Bach in July, August, and September, 1860.

On the 27th of March, 1868, Maas and Bache, Ulman & Bach commenced an action in the supreme court of New York against the bankrupt and his wife, the complainant in which, after setting forth the foregoing facts, averred that, while the bankrupt was so indebted to them, and while he was insolvent, and on or about the 14th of April, 1864, he purchased, with his own money and his own means, certain lands in the city of New York, with the dwelling-house thereon, particularly described in the complaint; that, on such purchase, the said house and lot of land were conveyed, by the direction of the bankrupt, and at his request, to his wife, by the vendors, by a deed of conveyance recorded July 5, 1864; that the bankrupt paid the whole or the greater part of the consideration or purchase money of the conveyance, and more than sufficient thereof to pay the amount of the said two judgments and interest; that the consideration or purchase money was \$7,400; that the house and lot are now worth over \$20,000; that the conveyance was voluntary and without consideration, as between the bankrupt and his wife, and

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was founded upon no other consideration, as between grantor and grantee, than the purchase money so paid by the bankrupt, and was fraudulent, as against the plaintiffs in the suit, as his creditors; that, on such conveyance, the legal title, in fee simple, to the house and lot, vested in the wife of the bankrupt, and was still in her, and a trust resulted in favor of said plaintiffs, as creditors of her husband, to an extent sufficient to satisfy their demands, being the amount of the said two judgments and interest; and that Sondheim was insolvent and had been so since prior to the purchase of the house and lot. The prayer of the complaint was for judgment, that the trust might be established and declared, that the plaintiffs might be declared to be entitled in equity to enforce the trust, that the wife of the bankrupt might be declared to be the trustee thereof, and that unless she should pay to the plaintiffs the amount due upon their judgments, with interest, the house and lot might be sold by a receiver, to be appointed by the court, and that out of the proceeds the judgments and interest may be paid.

On the 13th day of February, 1868, and before the said suit was commenced, the bankrupt filed his voluntary petition in bankruptcy. The creditors above named proved their said debts in the bankruptcy proceedings. On the 10th of April, 1868, this court made an order staying all proceedings in the said action until the question of the discharge of the petitioner in bankruptcy should be determined by this court. The creditors now apply to the court for an order vacating and setting aside such order of stay.

For the creditors, *A. R. Dyett, Esq.*; for the bankrupt, *Messrs. Benedict & Boardman.*

BLATCHFORD, J. The order of stay was made under that part of section 21 of the bankrupt act, which provides that "no creditor proving his debt or claim, shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained

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thereon, shall be deemed to be discharged and surrendered thereby, . . . and any such suit or proceedings shall, upon the application of the bankrupt, be stayed, to await the determination of the court in bankruptcy, on the question of the discharge." The action in question, so far as concerns the bankrupt as a defendant in it, is a suit for the debts set forth in the complaint, a suit to collect such debts, and the creditors, by proving such debts in bankruptcy, waived all right of action thereon, against the bankrupt, and the judgments, so far as they were judgments against the bankrupt, were thereby discharged and surrendered. This view applies, whether the action be regarded as founded on the original indebtedness or on the judgments. The order of stay was, therefore, proper, as respects the bankrupt. It is urged, however, that the suit ought to be allowed to proceed against the wife, as a suit to have the debts paid out of real estate of which the legal title is in the wife, and to enforce a trust created by the statute law of New York in favor of the creditors, it being provided thereby (1 R. S. 728, §§ 51, 52), that "where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance," subject only to the provision, that "every such conveyance shall be presumed fraudulent as against the creditors at the time of the person paying the consideration, and, where a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands." It is claimed, that, the real estate in question was, therefore, never the property of the bankrupt, and could not pass to his assignee in bankruptcy; and that it does not pass to such assignee under section 14 of the act, as being
"property conveyed by the bankrupt in fraud of his
163 creditors," because it never was * conveyed by the bankrupt. This view overlooks the true character of the suit brought by the creditors in the state court. Their com-

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plaint shows that the bankrupt took his own money and made the purchase of the house and lot ; that, on such purchase, it was conveyed by the vendors to the bankrupt's wife ; that the purchase money so paid by the bankrupt was more than enough to pay the judgments ; that the transaction was fraudulent as against the creditors ; and that a trust resulted in favor of the creditors to an extent sufficient to satisfy their demands. This trust they seek to have enforced against the house and lot, as representing the money so fraudulently applied by the bankrupt. The fraud, and the only fraud, committed by the bankrupt, was in taking his own money and using it in this way. Therefore, on the case set up by the creditors in their complaint, the money so used and applied by the bankrupt, as now represented by the house and lot, is "property conveyed by the bankrupt in fraud of his creditors." As such, it passed, by virtue of section 14 of the act, to his assignee in bankruptcy, and he can sue for and recover such property. Any equitable rights which the creditors had to enforce any trust created by the law of New York in their favor, in respect to such money or its representative, and any equitable right conferred on them by the bringing of their suit, is subordinate to the right and title of the assignee in bankruptcy. His title relates back to the 13th of February, 1868. The suit of the creditors was brought afterwards. The equitable right to enforce the statutory trust, is not such a lien or pledge as is saved or protected as against the assignee, by the provision of the 14th or the 20th, or any other section of the act.

The motion to vacate the order of stay is denied.

In re Hafer & Brother.

U. S. CIRCUIT COURT, E. D. PENNSYLVANIA.

Where an execution creditor, under a levy prior to proceedings in involuntary bankruptcy, has been delayed by an injunction under such proceedings, he is entitled to a summary hearing at any stage, after the execution of the assignment.

If the injunction has been issued out of the circuit court, under the equitable jurisdiction auxiliary to that of the district court in bankruptcy, the execution creditor may, at his election, require the assignee, as complainant, to proceed in the circuit court in equity, or invoke the summary jurisdiction of the court of bankruptcy for a decision of the question of priority.

In re HAFER & BROTHER.

THE adjudication of bankruptcy was made in the district court, during the pendency of auxiliary proceedings in equity, in the circuit court, to restrain execution creditors. Under an agreement between these execution creditors and the petitioning creditors, an order was made that the delivery, by the sheriff of Berks County, to the assignee in bankruptcy, of the property levied on at the suit of the execution creditors, might be made without prejudice to such valid and rightful lien, if any, under the levies by the sheriff, as might be sustainable against the assignees; so that the alleged rights of the execution creditors respectively, and the alleged adverse rights and interest of the assignee, and of the general body of creditors represented by him, might be fully and freely asserted, contested, and decided, under the proceedings in the circuit court, or in the district court in bankruptcy.

The assignee having been appointed and the assignment executed, he was, under an amended and supplemental bill, added, or substituted, as complainant in the proceeding in the circuit court. The answer of certain execution creditors having been filed, the case was, by consent, set down for a hearing as upon bill and answer, under an agreement that the only question for argument should be, whether the facts in the answer stated were, if proved, sufficient to defeat the bill. If the court should be of opinion that they were, the complainant was to be at liberty to file a replication and go into proofs.

In re Hafer & Brother.

Mr. *Darling*, for the assignee ; Mr. *Greenbank*, for the execution creditors.

CADWALADER, J. The effect of the agreement, under which the sheriff relinquished possession of the property levied upon, was to give to the execution creditors an option to proceed summarily in the district court in bankruptcy, to obtain adjudication upon their asserted right of priority, or to require the assignee to proceed in the equity suit in order to sustain, if he could, his asserted adverse right. So soon as an assignee was duly qualified, the execution creditors might have applied to the district court in bankruptcy for an adjudication upon their asserted priority. Upon such an application, the case would be referred for summary investigation to a commissioner, or to the register, to report upon the question of priority. His report would be subject to investigation, as that of a master in chancery or commissioner in ordinary cases, except that in bankruptcy such function may be executed somewhat less formally and more expeditiously. The execution creditors and the assignee might, perhaps, without any special reference to the register, attend before him and proceed as under such a reference.

Mr. *Greenbank*, for the execution creditors, then said, that he would prefer proceeding summarily before the register in bankruptcy. The case upon the hearing in equity then went off without any action by the court. The court, however, intimated that there would have been some difficulty in pronouncing a decision upon the question submitted, because upon a hearing on bill and answer, a greater effect is attributable to the answer than had apparently been here intended on the part of the complainant.

In re Charles E. Beck.

U. S. DISTRICT COURT, E. D. PENNSYLVANIA.

Where, under an agreement of the execution creditor, the property levied on passes into the possession of the assignee in bankruptcy without prejudice to such prior lien, under the levy, as may be sustainable, the assignee and the register should, if the execution creditor asks it, expedite the proceedings for such a decision.

But such proceedings, though summary and informal, should not be conducted by *ex parte* affidavits, nor otherwise in derogation of the rules of evidence.

In re CHARLES E. BECK.

A QUESTION having arisen as to an execution creditor's right of priority, which was disputed on the grounds that his lien was under an execution which, though prior to the proceedings in bankruptcy, was upon a judgment entered on a warrant of attorney given by way of preference, and with intent to defeat and delay the operation of the bankrupt law — and that the bankrupt had procured the execution to be levied.

Register Hobart certified that, in the course of the proceedings before him, the following question arose and was stated, and agreed to, by the counsel for the parties, namely :

“ Whether the facts set forth in the annexed affidavit, if proven, constituted an act of bankruptcy, so as to displace the lien of the execution of James H. Beck, and the levy made thereon, and prevent him from claiming the proceeds of the sale of the goods and chattels levied upon under the said execution, and set forth in the annexed affidavit.”

The affidavit referred to was that of James H. Beck, the execution creditor, who deposed that on the 29th of July, 1867, having heard that a note of the bankrupt had been protested, he called on the bankrupt and urged him to give security, which he refused to do, alleging his ability to go on with his business and pay all his debts, and explaining the protest as having been caused by unexpected disappointments, &c. ; that the deponent, not satisfied with the explanation, examined the books of the bankrupt, and becoming convinced

In re Charles E. Beck.

that a judgment was necessary for his security, again urged the bankrupt to give him one, promising not to enforce it unless there should be danger; that the bankrupt then declined, but proposed another meeting; that the deponent afterwards sent for the bankrupt and again pressed importunately for a judgment; that the bankrupt finally consented to give a judgment note for the amount of his indebtedment, upon the defendant's promise not to enforce it, unless the bankrupt should be pressed by other creditors. The judgment note was accordingly given on the 30th July, 1867, and delivered to the deponent, who kept it until the 20th of August, 1867, "when having heard that the creditor whose note had been protested, had commenced a suit upon it," and that judgment would be obtained at the approaching court, which would commence on the first Monday of September, the deponent caused the judgment to be entered on the said 20th August, when execution was issued and a levy made next day. There were general denials of collusion or intent to delay or defeat, &c., with an averment that the only purpose of the deponent was to secure, if possible, the payment of his claim, and a denial that the bankrupt took "the initiative in the confession of said judgment, or in the issuing of the said execution," and a statement that the execution was issued without the knowledge of the bankrupt, who, after it had been issued, applied to the deponent to have it withdrawn, alleging that he could work through his difficulties, &c.

The proceedings in bankruptcy were commenced on 29th August, 1867.

The petitioning creditor averred another act of bankruptcy, in giving a warrant to confess judgment to another creditor, namely, John O. Beck.

May 7, 1868.

CADWALADER, J. The certificate by the register of a question dated 4th instant, is received this morning. He asks my opinion whether the facts set forth in the annexed affidavit of James H. Beck, *if proved*, constituted an act of

In re Charles E. Beck.

bankruptcy so as to displace the lien of his execution, and of the levy under it, and prevent him from claiming the proceeds of sale of the subjects of the levy.

If the register had reported the facts instead of the evidence of them, the certificate would perhaps have been more regular. But I could not then have answered the question in its present form. They *may* have constituted an act of bankruptcy on the part of the debtor without *necessarily* depriving the execution creditor of his lien, because the bankrupt *may* have intended to give a preference without the creditor's knowledge, or intention, being such as to implicate him. In the present case the adjudication of bankruptcy may, for aught that I recollect, have been pronounced upon the transaction with John O. Beck, without any intimation of an opinion as to the transaction with James H. Beck. The petitioning creditor alleged that the warrant to confess judgment given to James H. Beck was an act of bankruptcy, and further alleged that the bankrupt procured the property to be taken in execution by the creditor. The latter allegation was that of a distinct act of bankruptcy, which, if committed, can scarcely have been committed without the creditor's privity.

It lies upon the assignee representing the general body of creditors, to impugn the apparently prior lien of this creditor. But in such a case very little evidence may suffice at the outset to shift the burden of proof so as to cast it upon him. Here the fact of the warrant of attorney having been given after the protest of a note of the debtor, which protest was known to the creditor who obtained the warrant of attorney, and the admitted facts which followed, certainly required explanation. Whether Mr. James H. Beck's affidavit suffices to relieve him of the burden thus cast upon him is a question which, if the affidavit were competent evidence, I could not finally decide without hearing an argument. Nor ought such a question to be decided, as upon a sort of demurrer to such evidence, without a definite understanding that the evidence on both sides concerning it is closed.

In re Charles E. Beck.

If the place of transaction of the business in this case were less distant, I would add nothing. But as the counsel on both sides, may be incommoded by leaving home, I will make two remarks, one of them on the question of preference, the other on that of procuring the property to be taken on execution.

The first remark is that the form of words used in conversations between a debtor and his creditor should be very little regarded where the words were not, in themselves, acts, or inducements to acts. When a debtor's commercial paper has already, with the creditor's knowledge, been protested, the effect of any conversation which follows may be determinable with more or less of reference to the frequency of other intercourse between the debtor and the creditor, and the * amount of the latter's knowledge of the details 164 of the former's business. Consanguinity may not be wholly disregarded in weighing the effect of the evidence. A circumstance which may sometimes be regarded is the subsequent continuing knowledge of the creditor, if derived from the debtor, of the movements of other creditors whom the preference may have been intended to defeat.

The second remark has in part been anticipated in the former connection. This remark is that Mr. James H. Beck, where he deposes that the warrant of attorney of 30th July, 1867, was kept by him until 20th of August, 1867, when he heard that the creditor whose note was protested had commenced suit upon it, does not state from, or through whom, this information was obtained. If it was obtained from, or through, the bankrupt, the fact may not be unimportant.

In administering this part of the business of a case in bankruptcy, the *ex parte* affidavit of a witness ought not to be received, much less that of a party himself whom the act of congress, 1864, makes a witness. Had Mr. James H. Beck been examined by way of deposition, and had he, after cross-examination by the counsel of the assignee, disclosed nothing more than appears in the affidavit before me, the register would probably, in taking the depositions, have

In re Thomas Noakes.

asked certain questions to elicit more complete information.

Every facility should be afforded to Mr. James H. Beck in obtaining a prompt adjudication of the question upon his claim of priority. The register is authorized to investigate it. His report upon it will be subject to exception. Such a report should be made as soon as the evidence on the part of Mr. Beck and the assignee shall have been fully adduced, and the question argued by counsel.

If I have overlooked the intended point of the question submitted by the register, he may restate it. A statement of his own impressions upon it, or of his reasons for presenting it, would not have been out of place in the certificate which he has already furnished.

U. S. DISTRICT COURT, MARYLAND.

If the assignees are satisfied that property taken by them did not belong to the bankrupt, they should return it without delay: if, however, they are in doubt, the claimant must seek redress by the appropriate remedy in the courts of the state.

The costs will be paid according to the discretion of the court.

If the bankrupt should select, under the state law, one hundred dollars' worth of property in real estate, he may receive in addition thereto furniture and other necessities of the value of five hundred dollars, but the allowance of this amount would vest in the sound discretion of the assignee.

In re THOMAS NOAKES.

IN this case Register Hurley certified that in the due course of such proceedings the following questions, pertinent to the same, arose, and were stated and agreed to by W. P. Maulsby, Esq., attorney for assignees, and A. D. Merrick, Esq., attorney for the bankrupt.

First. "Where the assignees have taken property found in possession of the bankrupt belonging to other parties, how are the real owners to recover it, and before what tribunal?"

In re Thomas Noakes.

Second. “ Are the assignees bound to set apart five hundred dollars to the bankrupt, and one hundred dollars under the state exemption, or is it optional with them to give what they please to him ? ”

The facts in this case are : The assignees found in the possession of the bankrupt, property belonging to other parties, and seized the same, and are now holding the property as assets of the bankrupt.

The assignees have valued the property set apart at a very high figure, and have set apart to him property belonging to other persons..

The register was of the opinion that the parties claiming ownership should sue out a writ of replevin in the Washington County circuit court, when the value of the property claimed amounts to one hundred dollars ; under that amount, before a justice of the peace.

To the second question, they are to look at the condition of the bankrupt, and act accordingly, so far as relates to the five hundred dollar clause. The other exemptions named in the law must be rigidly enforced.

GILES, J. The following questions have been certified to me by the register in this case :

First. “ Where the assignees have taken property found in the possession of the bankrupt belonging to other parties, how are the real owners to recover it, and before what tribunal ? ”

Second. “ Are the assignees bound to set apart five hundred dollars to the bankrupt, and one hundred dollars under the state exemption, or is it optional to give what they please to him ? ”

As to the first question. If the assignees are satisfied that property taken by them did not belong to the bankrupt, they should return it without delay to the owners. If they believe such property claimed by others is the property of the bankrupt, the claimant must seek redress by the appropriate remedy in the courts of the state, and if successful, and the assignees are condemned to pay the costs of such proceeding,

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it will rest with the court, upon the settlement of the assignee's accounts, to allow or reject the amount of such costs. This will depend upon the court's opinion of the action of the assignees as to whether, under the circumstances, they were right in taking, and holding on to, said property.

As to the second question, in reference to the exemption clause in the bankrupt act, there is some difficulty. I construe this clause as follows :

First. The wearing apparel of the bankrupt, with that of his wife and children, is exempt.

Second. The necessary household and kitchen furniture, and such other articles of the bankrupt as the said assignee shall designate and set apart, but not to exceed the sum of five hundred dollars. The assignee exercises his discretion in this matter, subject to the final decision of the court, if an exception be taken.

The law of this state does not exempt one hundred dollars in money, but one hundred dollars' worth of property, either real or personal, to be selected by the bankrupt, and the value ascertained by appraisement duly made by three appraisers summoned and sworn by the officers, &c. (I suppose in a bankrupt case by the register), and also wearing apparel, books, and tools of mechanics, but not books kept for sale.

I suppose the assignee should first ascertain what is exempt under the state law. The wearing apparel is exempt by both laws, the bankrupt and the state. Next, by the state law, the bankrupt's private library and his tools as a mechanic are exempt ; and lastly, such real and personal property as he may select, not exceeding in value one hundred dollars.

Then, by the bankrupt act, the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the assignee shall designate and set apart ; as to these he exercises his discretion, as I have shown, but altogether (furniture and other articles) not to exceed in value the sum of five hundred dollars.

Now, if the bankrupt under the state exemption has selected his furniture, or a part thereof, the same being exempt under

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the bankrupt law, there can be no second allowance for the same in any way.

If the bankrupt, under the state law, should select his one hundred dollars' worth of property in real estate, then it might happen that he might receive in addition thereto furniture and other necessities of the value of five hundred dollars, but this amount would rest, as I have said, in the sound discretion of the assignee.

The clerk will certify these answers to B. F. M. Hurley, Esq., the register in this case.

U. S. DISTRICT COURT, S. D. MISSISSIPPI.

The commencement of proceedings in bankruptcy transfer, to the United States district court, the jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith, and operates as a supersedeas of the process in the hands of the sheriff, and an injunction against all other proceedings than such as might thereupon be had under the authority of that court, until the question of bankruptcy shall have been disposed of.

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HILL, J. The questions in this case arise upon the demurrer of defendants to the bill of complainant.

The bill alleges that complainant, on the 30th of March, 1868, filed his petition in this court to be adjudged a bankrupt, and that in a short time afterwards the defendant, Eakens, sheriff of Lauderdale County, was about to seize the property surrendered, for the payment of taxes, and the satisfaction of sundry executions then in his hands as sheriff, and would proceed to sell the same, unless restrained by the injunction of the court; that in his opinion the amount of taxes claimed were more than he was liable to pay, and prays that the sheriff be restrained from interfering with said property, and that the estate of complainant be disposed of as directed by the bankrupt act. The defendants, by their demurrer, admit these statements to be true, but insist that the taxes

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due, and the judgments heretofore rendered, and the executions in the hands of the sheriff, constitute a *lien* upon the estate of complainant, and that this court has no power to interfere with the same.

Two questions are presented :

First. Has the complainant (there not having been time for the appointment of an assignee) the right to file this bill, or interfere on behalf of the general creditors? By the act, the bankrupt is required to render all needful aid to preserve and collect the estate for the benefit of the creditors. By a general rule adopted by this court, the petitioner is made the custodian of the property surrendered, until an assignee shall have been appointed, and he is held amenable to the court for any negligence in relation thereto. It is impossible, under the rules and orders of this court, that an assignee, other than a provisional one, can be appointed in less than about fifteen days after the filing of the petition, and frequently a much longer time elapses before an appointment is made. Creditors may be absent, and know nothing of the condition of the property; therefore the petitioner is not only authorized, but it is his duty to apply for such remedy as may be necessary to protect the estate. Besides, he has an interest in it; he may not obtain a discharge; in that event the property becomes his, subject to such liability as may have attached to it.

The next question is, did the sheriff, after the commencement of proceedings in bankruptcy, have a right to seize the property of the complainant surrendered, sell it, and apply the proceeds to the payment of the taxes and executions in his hands? We are not informed by the bill whether the judgments were enrolled, or not, or whether the executions were in the hands of the sheriff before the commencement of the proceedings in bankruptcy; upon the existence of one or other of these facts, a *lien* on any property for satisfaction would depend; but admitting that one or both did exist, the question remains, whether or not the sheriff had a right to make the seizure after the proceedings in bankruptcy had

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commenced. In the case of *Pennington v. Lowenstein et als.*, decided at Oxford a short time since, the court held that, when the levy was made before the commencement of bankruptcy proceedings, the possession and legal title being in the sheriff for the purpose of satisfying the process in his hands, he, as trustee, might go on and sell the property, unless enjoined from so doing. In such cases an injunction would not be granted, without a statement showing that a sale under such circumstances would be injurious to the general creditors, or to some one having a prior lien. When a levy has not been made before bankruptcy, no title to any specific property passes out of the bankrupt; only a general lien remained, which was liable to be defeated, and could only be rendered available by the aid of the court. The title to the property is held in abeyance by the proceedings in bankruptcy, and so soon as the assignee is appointed, it vests in him from the filing of the petition. The title, however, passes to him, subject to any lien, or incumbrance, which may then be upon it, which lien in such case can only be enforced through the agency of the bankrupt court.

Section 20 of the bankrupt act provides that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct."

This clearly gives the court jurisdiction of the subject matter, especially when taken in connection with the 1st and 25th sections. The 1st section confers full and ample powers on this court over the bankrupt, his estate, and all persons and questions connected therewith, providing for the presentation and enforcement of the rights of all parties as they existed at the date of the bankruptcy; the object being to adjust and enforce all their conflicting interests in as summary and as short a time as may be. This power is abso-

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lutely necessary to attain the object of the law, as, between the creditors, none can complain so long as his interests are protected. The power of congress to establish *a uniform system of bankruptcy* throughout the United States, and, as a necessary consequence, all the jurisdiction and power to accomplish its object and purpose, is expressly granted by the Constitution.

It is difficult to conceive any motive in this court to assume jurisdiction under this law which does not belong to it, and is not necessary to the proper administration of the law, but it would be unfaithful to refuse the exercise of constitutional and necessary powers merely because it draws with it a heavy amount of labor. The bill not showing on its face that a lien had attached in favor of these judgment creditors when the petition was filed, the demurrer would, for this reason, be overruled; but on the supposition that such lien did exist, either by the enrolment of the judgment or the executions being in the hands of the sheriff, it does not appear from the bill that they had been levied at the time complainant filed his petition in bankruptcy. The commencement of proceedings in bankruptcy transferred to this court the jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith, and operated as a supersedeas of the process in the hands of the sheriff, and an injunction against all other proceedings than such as might thereupon be had under the authority of this court, until the question of bankruptcy shall have been disposed of. Such being the case, the demurrer will be overruled, and the defendants allowed fifteen days in which to answer.

Messrs. *Shannon & Gallagher*, for complainant; *S. A. D. Steele*, Esq., for defendants.

In re John P. Smith & James Smith.

U. S. DISTRICT COURT, S. D. NEW YORK.

Before a voluntary petition was filed, an execution issued on a docketed judgment came into the hands of the sheriff, who had levied on and held personal property of bankrupt under a prior execution. *Held*, that liens against the real estate, by the New York law, were perfected in both cases within the saving clauses of sections 14 and 20 of the bankrupt act, and that the sheriff should be allowed to sell the personal property to satisfy the executions, and any deficiency would constitute a lien on the real estate, to be discharged on application to the court.

In re JOHN P. SMITH & JAMES SMITH.

BLATCHFORD, J. The facts in this case are as follows: On the 25th of October, 1867, John F. Barkley and Jacob C. Turfler recovered a judgment in the supreme court of New York, against John P. Smith and James Smith, the bankrupts, for \$334.10. A transcript of said judgment was filed and docketed in the office of the clerk of the county of Rockland, where the debtors resided and where real estate owned by them was situated, on the 29th of October, 1867. By the filing and docketing of such transcript, the judgment, according to the law of New York, became a specific lien on such real estate. On the 30th of October, an execution issued on the judgment to the sheriff of Rockland County was received by him. Under that execution, he, on the 1st of November, 1867, made a levy on certain personal property of the bankrupts.

On the 2d of November, 1867, John W. Morgan and William H. Morgan recovered a judgment in the supreme court of New York, against the bankrupts, for \$213.91. A transcript of said judgment was filed and docketed in the office of the clerk of the county of Rockland, on the 4th of November, 1867. On the 5th of November, at 10 o'clock A. M., an execution issued on the judgment to the sheriff of Rockland County, was received by him. Nothing was done by the sheriff under that execution, except to hold it.

On the 5th of November, 1867, at 3 o'clock P. M., the petition in this matter, it being a case of involuntary bankruptcy, was filed.

In re John P. Smith & James Smith.

The assignee in bankruptcy does not contest the validity of either of the judgments, or impeach the *bona fides* of the executions, or of the liens, whatever they were, acquired by the recovery of the judgments and the issuing of the executions and the levy, nor does he object to the application to the execution, in their order, of the proceeds of the personal property actually levied on by the sheriff under the first execution. The receipt of the second execution, after the levy under the first one, and while such levy remained in force, operated as a constructive levy under the second, and an actual levy under it was unnecessary. *Cresson v. Stone*, 17 Johns. 116; *Van Winkle v. Udall*, 1 Hill, 559.

The judgments became, both of them, liens on the real estate of the bankrupts, as against the assignee in bankruptcy, such liens having been perfected before the commencement of the proceedings in bankruptcy. The liens on the real estate by the docketing of the judgments in Rockland County, and the levy under the first execution, it operating also as a levy for the second execution, are such liens as are within the saving clauses of sections 14 and 20 of the bankrupt act.

An order will, therefore, be made that the sheriff be at liberty to sell the personal property on which he levied, or so much thereof as may be necessary to satisfy the two executions, and apply the proceeds thereto in the order of the receipt of the executions by him. If there shall be any deficiency to satisfy either execution, it will continue to be a lien on the real estate, and it will then be for the court to determine, on the application of the assignee or the creditor, on notice, whether the lien shall be discharged by the assignee under General Order No. 17, or whether some other of the courses provided for by sections 14 and 20 shall be adopted. The assignee objects to paying the deficiency out of the personal property of the bankrupt in his hands. No reason for this objection is assigned. Under section 14 the assignee is authorized, under the direction of the court (and General Order No. 17 was made to carry out this provision), to discharge a lien on real estate, or to sell the real estate subject to the lien.

C. D. Tuttle v. D. W. Truax:

J. H. Hull, attorney for John & W. H. Morgan.

W. J. Hascall, attorney for Barkley & Turfler.

A. Fallon, attorney for assignee.

U. S. DISTRICT COURT, MINNESOTA.

Where a creditor, knowing of the embarrassment of his debtor, takes a mortgage to secure a preëxisting debt, and also a credit given at the time of the execution of the mortgage, the mortgage, being void in part as to the preëxisting debt, must be held to be void as to the whole.

C. D. TUTTLE v. D. W. TRUAX, *Assignee*.

NELSON, J. The main point involved in this case is, did the mortgagee have reasonable cause to believe the debtor insolvent at the time the mortgage was executed? The insolvency of the debtor is, in our opinion, clearly established by the evidence.

Two witnesses have been examined; the petitioner, in his own behalf, and the bankrupt, on behalf of the respondent.

The circumstances attending this transaction are as follows:

Some time in November, the debtor was negotiating a contract with Messrs. Gould & Little, for the latter to go into the pineries and get logs for him, to be delivered the following spring, and to consummate the contract, it became necessary for him to make provision to furnish them, as they might want, \$1,500 worth of supplies. Petitioner was dealing in the kind of supplies they wanted, and the debtor applied to him for them, stating for whom, and for what, they were wanted, and that he wanted to get them on a credit of eight months. The petitioner was willing to accommodate him, but demanded security; and a chattel mortgage, upon the logs and lumber the debtor then had at his mill, was finally agreed upon as the security. The debtor at that time was owing petitioner a balance on book account of about \$1,000; and petitioner insisted that the note and mortgage should be made to include and cover this also, and he assented.

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The petitioner at this time knew that there was a prior mortgage upon the same property he took as security ; also that the mill was mortgaged, and that the debtor was unable to pay his employees at the mill ; although he now claims that only within two days after the execution of the mortgage, he first learned the condition of the debtor. He heard he was threatened with proceedings in bankruptcy, and on finding that the lumber embraced in his mortgage was being hauled away from the yard, he took possession of the property.

The 35th section of the bankrupt act, relating to fraudulent transfers, &c., declares that "if such a transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud." While we may concede that the bankrupt, being largely engaged in the manufacture of lumber, was necessarily compelled in the course of his business to borrow money by mortgage of his property, we think the evidence brings this case within the purview of the 35th section. This conveyance was given to secure a preëxisting debt admittedly incurred outside of his ordinary business. This fact, therefore, was *prima facie*, and if uncontrolled, sufficient evidence to establish reasonable knowledge on the part of the mortgagee of the debtor's insolvency. 2 Allen, 20, 491. He was put upon inquiry, and should have taken steps to ascertain the condition of the debtor, or at least his general reputation as to solvency in the place where he resided. 4 Gray, 111, 574. He has made no effort to rebut this presumption of fraud, and the mortgage, being void in part as to the preëxisting debt, is void as to the whole. 2 Cushing, 160 ; 7 Howard U. S. Rep. 627 ; *In re Black & Secor*, 1 N. B. R. p. 81, *quarto*.

Prayer of petition denied.

In re David Shields.

* U. S. DISTRICT COURT, W. D. PENNSYLVANIA. 170

The rule requiring the assignee to make a report of exempted property within twenty days, is to receive such a construction as to prevent injustice to the bankrupt, and it may be extended by the court and leave granted to the assignee to make a further report.

In re DAVID SHIELDS.

IN this case it appears by the report of the assignee, John W. Rohrer, Esq., that a sale was made by the sheriff of Armstrong County, of a large portion of the bankrupt's personal property, subsequent to the filing of his petition in bankruptcy; and that the proceeds of the sale of said property are in the hands of the sheriff, awaiting a decision of the court of common pleas of that county as to whether the same should be paid to the assignee of said bankrupt's effects, or to the creditors upon whose judgment it was sold.

Until that question be decided, it is deemed proper that the assignee should not be required to make a final report of exempted property or be precluded from making an additional report, in case such should become necessary, so that the assignee may be able to set apart so much of the proceeds, arising from the sale of the personal property, as would secure to the bankrupt the amount allowed to him as exempted by the bankrupt act.

Rule 19th, requiring assignees to make report to the court within twenty days after receiving the articles set off to the bankrupt by them, is to be strictly observed in all ordinary cases, but it is to receive such a construction as to prevent injustice to the bankrupt; and in cases like the present, where the property has not come into possession of the assignee, and a question, as to his right to it, is pending in court, it would seem to be a just and reasonable construction of the rule, and the only one that could give proper effect to the provisions of the 14th section of the bankrupt law, that the time shall be computed from the date of the final decision of

In re Henry Gettleston.

the court, so as to give twenty days after the property is adjudged to be within, or under, the control of the assignee.

In this view of the question, the register is of opinion, that, for the reasons stated by the assignee in his report (as herein substantially restated), the time for making an additional return of exempted property, as prayed for by the assignee, should be granted.

Respectfully submitted,

JOHN N. PURVIANCE, *Register.*

ALLEGHANY CITY, 8th May, 1868.

PER CURIAM. The decision of the register is approved, the time is extended, and leave granted to assignee to make further report.

May 9, 1868.

U. S. DISTRICT COURT, CALIFORNIA.

It was the intention of congress to make the register's acts the acts of the courts, and to vest them with all the powers of the district courts in relation to all matters about which there is no contest. They are also to give their opinions upon all questions, points, and matters arising before them upon which there is a contest, which opinions will be final unless the parties litigant request the question, point, or matter contested to be certified to the district judge.

In re HENRY GETTLESTON.

THE following opinion, by Judge Bates, and approved by Judge Hoffman, will be read with interest by lawyers throughout the states.

In this case, on the 25th of November, 1867, Henry Gettleston the bankrupt, by Wm. P. Daingerfield, his attorney, presented to the undersigned, as register in bankruptcy, a petition, a copy of which is hereto annexed, praying that he may be decreed to have a full discharge from his debts provable under the bankrupt act, and that a certificate thereof may be granted to him in accordance with the same.

On the 10th day of December, A. D. 1867, the said bankrupt, by his attorney, appeared before the undersigned and

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moved that an order of publication and notice be granted, fixing the time and place of holding a court of bankruptcy, at which all the creditors who have proved their debts, and other persons in interest, may appear and show cause, if any they have, why the prayer of the aforesaid petition should not be granted; and also, they further order that the second and third meetings of the creditors of the said bankrupt, required by the 27th and 28th sections of the bankrupt act, shall be held at the same time and place to be fixed for the serving of the petition for a discharge, and that all the creditors of the said bankrupt, and other persons in interest, may then and there appear and prove their debts, if not already proved, and show cause, if any they have, why the prayer of the petitioner should not be granted.

And also, the further order that a copy of the said petition and order to be granted, shall be published according to law.

Upon hearing the foregoing motion for the order aforesaid, the undersigned, as register in bankruptcy, refused to grant the motion, on the ground that although the acts set forth in this petition were sufficient upon which to base the order asked for, doubts have been expressed by members of the bar as to the powers of the registers in bankruptcy to act in relation to any other matters than those specified in section 4 of the bankrupt act, and Rule 5 of the General Orders in Bankruptcy of the supreme court of the United States, unless the district court shall in any particular matter otherwise direct.

Upon the undersigned, as register, refusing to grant the order, as requested, the petitioner, by his attorney, pursuant to the provisions of section 6 of the bankrupt act, proposed to take the following points of law, arising in the course of proceedings before a register, which the undersigned hereby certifies to the judge for his opinion thereon.

Have not registers in bankruptcy, to whom a case is referred, under Form 17, as prescribed by the supreme court of the United States, power, and is it not their duty to do

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and perform each and all of the acts that the district judge has the power to do and perform, unless an issue of fact or law is raised and contested by a party to the proceeding before him? And until such issue of fact or law is raised, does not a register to whom a case is referred possess all the powers of the district court in relation thereto, except the power to commit for contempt?

Rule 17 of the district court requires that a register, certifying a question of law to the court, shall briefly state his opinion of the same.

Pursuant to the requisition of the rule the undersigned gives the following:

OPINION OF THE REGISTER.

The bankrupt act, as it was finally passed by congress, contained many provisions that are not precise in language, and therefore impose upon the courts of the country the onerous duty of hearing, and deciding, many questions as to their construction, that would have been avoided had the original bill, as proposed, been passed. The act, as it now stands upon the statute book, contains many of the provisions of the insolvent laws of Massachusetts and of "The New Law of Bankruptcy," as recently adopted in England. The provisions in relation to the powers and duties of registers are almost identical in the English and American bankrupt law. Such being the case, it is not a matter of surprise that the language of the several provisions of the law is not as carefully selected, or precisely used, as would be desirable.

In England the administration of the bankrupt law devolves upon the lord chancellor, commissioners who are vested with like powers as the district judge, registers and assignees, and other inferior officers, as clerks, taxing masters, &c.; and the registers bear the same relation to the commissioners that the registers in the United States do to the several district courts.

Being without the ability to refer to books of English authority to determine what have been adjudged to be the

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powers of the registers under the English bankrupt act, I can only infer that as there are but a limited number of commissioners, that the powers and the duties of the registers are coequal with the commissioners in all cases, when there is no contest, as any other supposition would impose upon the commissioners more duties than it would be possible for them to perform.

In exercising the powers imposed on congress, by the 7th section of article 1 of the Constitution, to establish "uniform laws on the subject of bankruptcies throughout the United States," that body was embarrassed by the conflict of interest of the several states, which have heretofore given different measures of justice to creditors residing within and without their jurisdiction, and forced to impose upon the federal district courts already in existence the duty of administering the bankrupt law, rather than establish separate and distinct bankrupt courts to carry out the wholesome provisions of the act that recognized a bankrupt as the trustee of his creditors. But for the conflict of interest of the several states, a uniform and independent system would probably have been adopted, and in providing for its administration the confusion and uncertainty that now exists as to the powers and duties of the registers would not have occurred.

To impose upon the federal courts, without additional assistants, the burden of administering the law, would practically have nullified the benefits to result from the act, both to the debtor and creditors, who are alike interested in its speedy and just administration. It became, therefore, necessary to create a large number of federal officers called registers, and, to avoid the complaint that the treasury was to be depleted for their benefit, the law provides for their appointment, and the payment to them of fees for their services, by the bankrupt, or out of the fund belonging to the creditors, and then imposes upon them certain duties to perform for those fees. It was clearly the purpose of congress to relieve the federal courts by providing for their appointment and conferring upon them powers, as "assistants to the dis-

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trict judges," that would leave the district judges only to decide contested questions, after they had been passed upon by the registers; and when that body defined their duties, it appears to me, it was intended that they should perform all other duties imposed upon the district court, when there was no issue of law or fact raised in the proceedings, and that their adjudications were to be complete and final in all other cases. When a conflict arose between a bankrupt and his creditors, or the assignee of the estate of the bankrupt and the representative and the trustee of the creditors, upon a question of fact, to save the machinery and expense of an independent and separate court, it was thought prudent and wise to provide that the issues of facts should be certified in the district court, that the same might be tried and settled by a jury, if necessary, or reviewed by the district judge, if the parties litigant were not satisfied by the decision of the register.

171 * When a question of law should arise in the proceedings, congress evidently intended that parties to the contest should have a right to the final decision upon it given by the district judge, as it was not to be expected that the several hundred registers appointed under the bankrupt act, would be found competent to finally dispose of the many grave questions of law that will arise in adjudicating upon, and distributing, the large funds belonging to creditors that will become subject to the control of the court of bankruptcy.

But when there is no contest, and no opposing interests are in conflict, no good reason can be given why the registers shall not "sit in chambers, and dispatch there such part of the administrative business of the courts, and such uncontested matters, as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct," in accordance with the letter of the law.

The judges of the supreme court, when they prescribed the order of a form of an order of reference in voluntary bankrupt cases, must have understood the act as conferring upon the register all of the powers of the district court not reserved by

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special prohibitions, or they would not have used the following language: "It is thereupon ordered that the petition be referred to one of the registers in bankruptcy in this court, to make adjudication thereon, and take such other proceedings therein as are required by said act; and further, that the said bankrupt shall, on or before day , at o'clock, file with said register a duplicate copy of said petition and the schedules thereto annexed, and that he attend before said register on said day, and thenceforth as said register may direct, to submit to such orders as may be made by said register, or by this court, relating to his said bankruptcy; and further, until otherwise ordered by this court, the said register shall act upon the matters arising in this case at his office at , at such times and place as he shall fix for that purpose."

By this form of reference the bankrupt is subject to the control of the register of the court, during the pendency of the reference; and, unless the register makes illegal orders, upon which the bankrupt takes the opinion of the district judge, who may determine the question as to their legality, he is to submit to such orders as judicial mandates of a court competent to make them.

The register shall also, by express letters of order of reference, act upon the matters arising in the case, until otherwise ordered by the court.

By the general rules and orders of the supreme court, therefore, in all cases where a reference is made under the form of reference prescribed, the authority to act upon and dispatch all matters arising in the case so referred, is clearly given to the register, under section 4 of the bankrupt act.

Should any other construction be given to the act, and rules and orders of the supreme court, it would operate as a great hardship upon the parties litigant, and practically defeat the objects intended to be accomplished by them.

A register in bankruptcy is privileged to reside wherever it may suit his convenience, within the jurisdiction of the district court, the judge of which he is "to assist in the per-

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formance of his duties " (as provided in section 3d), and should the register of this district establish his office at Los Angeles, as a geographical centre of the congressional district, and undertake there to dispatch the administrative business of the court, without as full and ample powers as are granted to the district judge, so much of the bankrupt law as was intended to relieve the district judges would be in fact a nullity; and if the parties litigant were required to go to the district judge for all orders that the statute authorizes *the court* to issue, it would be denying justice to compel them to do so; and should the district judge determine that the register has not the power to act in any case when, by the language of the statute, the court is to act, the burden of the administration of the law will fall upon him, and both the debtor and creditors may be put to great inconvenience.

But aside from the inference to be drawn from the provisions in section 3, that the district courts are to "appoint one or more registers in bankruptcy to assist the judge of the district court in the performance of his duties under this act," and from the form of reference, prescribed by the judges of the supreme court, that the powers, and duties, of registers are coequal with that of the district judges when there is no contest, such powers and duties are clearly given in all cases in which "the judge of the district court may direct a register to attend at any place within the district, for the purpose of having such voluntary applications under this act as may not be opposed; of attending any meeting of creditors, or receiving any proof of debt, and generally, for the prosecution of any bankruptcy or other proceeding under this act," &c., pursuant to section 5 of this act.

If the register, by special orders of a judge of a district court, can be vested with all of the powers "for the prosecution of bankruptcy or other proceedings under this act," what good reasons can be given why, by a general order of the court, he cannot be vested with like powers and duties? If he has judicial powers in one case, why should he not have it in the other?

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In the concluding paragraph of section 11, which provides for the issuing of the warrant to the messenger, by the "judge of the district courts," or, if there be no opposing party, by the "register of said court," it is provided that a notice shall be given "that a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts, and choose one or more assignees of his estate, will be held at the court of bankruptcy, to be holden at the time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

The supreme court, in prescribing the form of the notice to be given, use the following language: "You are hereby notified that a warrant has been issued," &c., and then "that a meeting of the creditors of said bankrupt, to wit: (then insert the names of the several creditors of bankrupt with their several places of residence and amount of debts, respectively, in the following form:) E. G., A. B., Boston, Mass., \$500, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden on the day of , A. D. 18 , at o'clock M., at (here insert the place, building, room, or office where the court will be held), before register, and have you then there this warrant, with your doings thereon."

It is apparent that both the statute and the supreme court treat the register, acting, in issuing the warrant and holding the meetings of creditors, called pursuant to its mandate, as a court of bankruptcy, and, as such, fully authorized to perform all of the functions of a court, and determine all questions properly cognizable in a court of bankruptcy, subject only to the control of the district judge, when the parties litigant are disposed to have his adjudication reviewed.

A further analysis of the law is not deemed necessary by me, as I herewith hand to the district judge a more elaborate reference to and comment upon its several provisions, prepared and submitted to me by Tully R. Wise, Esq., who is counsel in another case, in which he has filed a petition for

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the discharge of his client, after this argument, as now submitted by me, had been prepared.

In my opinion, it was the purpose of congress to make the register's acts the acts of the courts, and as "an assistant to the district judge" in bankruptcy proceedings, in all cases referred to him by the rules prescribed by the supreme court, and to vest him with all of the powers of the district court, in relation to all matters about which there is no contest; and that, under the rules of the district court of California, he is to give his opinion upon all questions, points, and matters arising before him, upon which there is a contest, and that his opinion will be final, unless the parties litigant request the question, point, or matter contested to be certified to the district judge: except he is not empowered "to commit for contempt, or to hear a disputed adjudication on any question of the allowance of suspension of an order of discharge," when a party to the proceedings in bankruptcy opposes the allowance, or asks the suspension of an order of discharge. In all such cases it is the duty of the register to immediately certify the question of fact or of law without hearing or determining the same, to the district judge, to be disposed of by him, with or without the aid of a jury, according to the provisions of the bankrupt act.

But, as I have before suggested in the statement of the case (although I have no hesitation in announcing my opinion as here given), I have refused to grant the order asked, that the question may be fully argued and decided.

ASHER B. BATES, *Register*.

SAN FRANCISCO, *December* 14, 1867.

HOFFMAN, J. Upon reading and considering the foregoing certificate, together with the opinion of the register thereon, and of the brief submitted therewith, it is my opinion that the conclusions of the register upon the points of law therein stated are correct and in accordance with the provisions of the bankrupt act, and so far as this decision is in conflict with Rule 17 (in bankruptcy) of the district court of

In re Tatnall Baily.

California, it is to be regarded as the rule of this court in the future, by which registers are to be guided.

The clerk will certify this decision to the register, Asher B. Bates, Esq.

U. S. DISTRICT COURT, S. D. NEW YORK.

B. acts as agent and attorney for his brother in buying and selling merchandise in New York city, at an office having a sign with his brother's name on it, and well known by those who had dealings with him to be doing such business at that office:

Held, to be carrying on business within the meaning of the 11th section of the act.

In re TATNALL BAILY.

I, EDGAR KETCHUM, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said court before me, the following question arose pertinent to the said proceedings, and is stated and agreed to by the counsel, who appeared for the bankrupt, Mr. James E. Wheeler, who requested me to certify the same to the judge.

Facts. The petition was filed on the 29th day of February, 1868, and set forth that the petitioner had carried on business for six months next immediately preceding the filing thereof, at the city of New York.

It is now declared, in a paper filed with the register by the attorney, that the petitioner did not reside within the Southern District of New York any portion of the six months aforesaid. For some years before his insolvency he carried on business on his own account in the city of New York, and from the end of that time to the time of filing his petition, and during the six months aforesaid, he has been carrying on business as the agent and attorney of his brother, in buying and selling merchandise, keeping an office for that purpose in the city of New York, with his brother's name upon the sign, and well known to those who had had dealings with

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him as so carrying on business at such office. This service has been under a power of attorney, duly executed by the petitioner's brother, and for the compensation of one half the profits of such business.

The warrant has been issued, and the first meeting of creditors is to be held the 8th of June.

The question is, whether the petitioner was carrying on business for the six months preceding the filing of his petition in the Southern District of New York, within the meaning of the 11th section of the act.

OPINION OF THE REGISTER.

I am of opinion that he was. He was not carrying on business on his own account, but was the clerk of his brother, and yet it seems to me this is the proper answer. I submit the question with careful consideration in view of the decision of this court in the *Matter of Magie* (N. B. R. vol. 1, p. 153, *quarto*), upon the certificate of Mr. Register Dwight, and in the belief that this conclusion is supported by the reasoning in that case of the register, and by the authority cited by the judge.

The bankrupt act of 1841 directed all petitions by any bankrupt, &c., to be filed in the district court of the district where the bankrupt shall reside, or *have his place of business*, at the time of filing such petition.

The act of 1867 requires the petition to be filed in the judicial district where the debtor has resided, or carried on business, for the six months next immediately preceding the time of filing such petition.

The petitioner, Magie, "was formerly in business for himself at Chicago, and has been engaged in looking after a personal matter since he came from Chicago, *with an intent of returning there*. He had been engaged as a book-keeper for a firm in New York city since January 1, 1868. Before that, and from October, 1867, he had been engaged in keeping books for another firm in New York city." He resided with his father in New Jersey.

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Mr. Register Dwight, in this case, was of opinion that "the law intended to confer jurisdiction on those courts only where the petitioner would be known publicly as a resident and citizen, or where he had such business relations with the public generally as would equally cause him to be known," and he denied adjudication.

His honor, Judge Blatchford, thought the register correct in his decision, and that the principles laid down by this court, *In re Kinsman* (1 N. Y. L. O. 309), in reference to a kindred provision in the bankrupt act of 1841, made it improper for the court to assume jurisdiction in this case.

In the case cited, the bankrupt lived with his family in Philadelphia, and between the first and the middle of March, 1842, he came to the city of New York, employed as agent for a machinist, and took board at a public hotel. He was superintending the erection of a building for manufacturing lead, and he described himself in his petition as "agent for machinist." The petition was presented on the 22d of March. If he arrived in New York on the 7th, he had been a fortnight there when he presented his petition; and nothing in the case showed he was there afterwards. The court said: "To a certain sense the place of the most transient stoppage, a mere purchase, a bargain made by a man on his transit through a place, would render it for the time being his place of business.

"A fugitive or equivocal occupation, that may continue for a long period, or may terminate instantaneously, without any outward indications to mark its continuance or character, will not be sufficient to satisfy this provision of the law.

"More must be shown. It must appear that he has a *fixed and notorious employment, pursued by him in such manner as to denote a place of business established by him, distinct from his place of residence.*"

It appears to me that this authority does not sustain the doctrine, which is supposed to be established without any qualification by the decision in the *Case of Magie*, that where a bankrupt resides in one judicial district, and is employed

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as a clerk in another, he, *therefore*, cannot be heard as a petitioning debtor in the latter district. For it is well known that bankrupts, known to be such, cannot "carry on business" upon their own account. The very object of the bankrupt act is to liberate the honest and unfortunate debtor from a state of subjection and poverty, so that his enterprise and industry may be allowed full scope, for the equal benefit of the community and himself and his family. A trader doing business on his own account may indeed be a voluntary petitioner for discharge from his debts, or, under the provisions of the present law, he may for any act specified by the law be forced into bankruptcy; but, in the great number of cases of *voluntary* bankruptcy, the petitioner will be found to have been for some time, and, perhaps, for a long time, in some subordinate employment. And, I think, the act of congress contemplates such cases as being those where the petitioner "has carried on business" at the place where that employment was had. The speeches made in congress in support of the bill, and especially those of the Hon. Mr. Jenckes, of Rhode Island, chiefly able and influential in preparing it and securing its passage, show this. Judge Betts, in the *Case of Kinsman*, uses this word "*employment*," and contrasts what is, as we commonly say, *permanent* employment, with a mere bird of passage, alighting at a hotel to superintend as "agent of machinist" some rising structure, such as the machinist may put up in some given period of time in any part of an extensive country, sending his agent with a carpet-bag to the hotel of the place, while he superintends it, and soon receiving him back again at the shop.

"Notorious" is a term of relative and not absolute signification as used here. The employment need not be absolutely notorious, else few could be brought within its meaning, but it must be notorious among those to whom the petitioner is known and with whom he associates in a social or business way, and it is quite certain that many persons who are clerks, and no more than clerks, are in this sense "notoriously" employed as such, and that *permanently*, using the word with

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as much accuracy and fitness as it can be used with, in any application of it to human affairs.

As a matter of fact it is notorious (though not, indeed, universally known), that many persons who have been and are petitioning debtors in bankruptcy, residing in other judicial districts, are clerks in the city of New York, employed in well known houses, men of talent, extensive acquaintance, and large influence. And some of these men, though clerks, are much more widely known than some persons who do business on their own account, and have signs over their doors with their names on them.

Many petitions have been filed in the city of New York by clerks residing in other judicial districts, once traders on their own account; and it is too late to file new petitions elsewhere, and if it were not, they are unable to incur the expense of new procedure.

Under these circumstances, and with a strong impression of the correctness of the view here taken, and of its agreement with all the opinions expressed in the cases cited, and of the importance of a rehearing upon this question, I respectfully submit this paper to the consideration of the judge.

EDGAR KETCHUM, *Register*.

BLATCHFORD, J. I am of opinion that the petitioner was carrying on business, for the six months next immediately preceding the filing of the petition in the Southern District of New York, within the meaning of the 11th section of the act.

The clerk will certify this decision to the register, Edgar Ketchum, Esq.

In re Thomas Princeton.

U. S. DISTRICT COURT, WISCONSIN.

Creditors having reasonable cause to believe a debtor insolvent, and accepting chattel mortgages from him to secure their debts, thereby participating in such a fraud on the act as to found a proceeding against the debtor in involuntary bankruptcy, will not be permitted to relinquish their intended preferences, and claims, to prove their debts under the 23d, or any other, section of the bankrupt act.

In re THOMAS PRINCETON.

MILLER, J. The petition of creditors against this debtor represents, as the cause of bankruptcy, that he, being insolvent and unable to pay his debts, and with intent of giving preference to certain creditors therein named, made seven chattel mortgages of his entire stock of goods. It is also shown that the aggregate amount of the mortgages exceeds the value of the goods; and that an agent of the mortgagees was in possession and had advertised the goods for sale at auction, when the marshal took them under a warrant issued on the petition.

Adjudication of bankruptcy against the debtor being made, on reference before the register to take proof of debts, objection was taken to the proof of the debts, of the several mortgagees. The register suspended proceedings and certified the matter for the opinion of the judge.

The objection to the proof of those debts is founded on the following provisions in section 39 of the bankrupt act: "If such person (the debtor) shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this act, providing the person receiving such payment or conveyance has reasonable cause to believe that a fraud in this act was intended, or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy."

The bankrupt act, being founded upon a principle of equity, and just distribution among creditors, forbids an insolvent debtor parcelling out his estate to preferred creditors. It is so rigid in this particular, as to provide, in section 35, that where a sale, or transfer of property by an insolvent debtor is not

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made in the usual, and ordinary, course of business, the fact shall be *prima facie* evidence of fraud.

The act also imposes upon creditors duties in regard to their debts, and even forfeitures. In this case, a debtor, notoriously insolvent, made seven chattel mortgages of his entire stock in trade to secure creditors; and an agent of those creditors being placed in possession of the mortgaged property was about to dispose of the goods at auction, when the marshal seized them under the warrant. The mortgages are *prima facie* evidence of a fraudulent intent on the part of the debtor, but they may not be, *per se*, of such intent on the part of creditors. If a mortgage be given to a preferred creditor, without his knowledge, as is alleged on the part of some of the mortgagees, or if a creditor, upon receipt of knowledge of such preference, repudiates it, the prohibition or penalty of the law in respect of his debt is not to be enforced against him. The act only prohibits the proof of a debt where the preferred creditor "had reasonable cause to believe a fraud on the act was intended, or that the debtor was insolvent." The prohibition is clearly applicable in this case to the debts of those creditors who had reasonable cause to believe that their debtor was insolvent when they accepted the mortgages or attempted to enforce them by a sale of the property.

It is alleged on the part of some of the preferred creditors, that they surrendered their mortgages, and should be allowed to prove their debts under the following provision in section 23 of the act: "Any person, who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made, or given, by the debtor contrary to any provision of this act, shall not prove the debt or claim, on account of which the preference was made, or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference." It will be observed that the mere acceptance of a preference by a creditor does not preclude him from

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proving his debt or receiving dividends. In addition to such acceptance the creditor must have reasonable cause to believe that the preference was made, or given, by the debtor contrary to a provision of the act — that is, as in this case, that the debtor was insolvent. And in such case, under the 35th section the assignee may recover of the preferred creditor the property received, or its value. Under sections 23 and 35, where a creditor accepts a preference with reasonable cause to believe that his debtor is committing a fraud upon the act, he is barred from proving his debt or receiving dividends unless he make return of the matter so received, and on failure to do so he may lose both, and all benefit from the preference, and dividends of assets.

The phraseology and intent of sections 23, 35, and 39 are different. Section 23 provides that any person who, *after the approval* of the act, shall have accepted any preference, having reasonable cause to believe, &c. Section 35, declaring void preferences and fraudulent conveyances, limits the time of prohibition to four and six months. These provisions of the act prohibiting preferences to creditors, are general directions for its administration upon the principle of equality. Section 39 prescribes the several causes of involuntary bankruptcy as frauds, and authorizes proceedings against the debtor at the instance of creditors. It is made a cause of bankruptcy for an insolvent debtor to prefer a creditor, in any manner therein stated. And if the debtor shall be adjudged a bankrupt, the assignee may recover back the money, or property, received by the preferred creditor, provided, such creditor receiving such preference, had reasonable cause to believe that a fraud on the act was intended, or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy. This prohibition as to the creditors is predicated on the adjudication of bankruptcy upon the allegation in the petition against the debtor. And the creditor, having reasonable cause to believe the alleged violation of the act by the debtor, is considered a participant in the offence against the act, and is, therefore, prohibited from proving his debt in bankruptcy.

In re Benjamin F. Appold.

The act requires proceedings in cases of involuntary bankruptcy to be prosecuted at great expense, and it seems just that the creditor who knowingly encourages, or aids, a debtor to commit a fraud on the act, to the prejudice of the other creditors, should be deprived of all benefit under the act. It cannot be permitted to a creditor who, with reasonable cause of knowledge, has participated in such fraud on the act as to found a proceeding against his debtor, to relinquish his intended preference and claim to prove his debt under the 23d or any other section of the bankrupt act.

U. S. DISTRICT COURT, E. D. PENNSYLVANIA.

Quære, Whether under the present bankrupt law of the United States, goods, if the estate in the hands of the assignee are distrainable for rent?

If they are not, it is because they are not less in legal custody than goods taken in execution; and under the equity of any laws of the respective states which, like the English statute 8 Anne, c. 14, entitle a landlord to payment of rent accrued, not exceeding one year's, out of the proceeds of goods sold under an execution, the landlord, who is prevented from distraining, may demand such an amount of rent from the assignee in bankruptcy.

Such a rule of decision is not inconsistent with apparently contrary decisions under the English system of bankruptcy.

Though rent, as such, may not accrue during the proceedings in bankruptcy, an equal charge for storage may, for a certain period, under certain circumstances, be incurred by the assignee.

So far as conformity in the procedure under executions out of the federal courts, and out of the courts of the respective states, had been attained under the act of congress of May 19, 1828, and the rules of practice in the federal courts, which, under the authority conferred by that act, had, from time to time, been adopted before the present bankrupt law was passed — the constitutional requirement, that the system of bankruptcy should be uniform throughout the United States, has been fulfilled, if the bankrupt law operates uniformly upon whatever would have been liable to execution if no such law had been passed, though the subjects of its operation may not be in all respects the same in every one of the states.

In re BENJAMIN F. APPOLD.

ON May 1st, 1868, Register Slaymaker certified the following questions, agreed to by the assignee of the bankrupt and

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the attorney of the bankrupt's landlord. The room in which the bankrupt had conducted his business of a grocer, was leased to him at \$62.50 per quarter. On January 24, 1868, the day appointed by the assignee for the sale of the goods of the estate on the premises, a bailiff of the landlord appeared, and by virtue of a warrant from him, distrained the goods for \$125, due for two quarters rent. The bailiff did not sell the property, but it was agreed by and between the principal and the assignee, that the latter should make the sale, and that the proceeds "in his hands should remain subject to the claim of the landlord just as the goods then were." The assignee made the sale and received the proceeds. In his account, as audited before the register, immediately following the statement of the balance for distribution, was a memorandum, that this balance was subject to such rights as the landlord of the bankrupt, might have obtained by virtue of the levy made by his bailiff, and of the agreement made as above by the assignee. The questions presented were, *First*. Is the landlord entitled to take out of the balance in the hands of the assignee the sum of \$125 due to him by the bankrupt for rent? and *Second*. Has the register authority to direct or sanction the payment of this sum to the landlord by the assignee out of the balance in his hands, as shown by the account?

CADWALADER, J. Under the present system of bankruptcy in the United States, the estate in the hands of the assignee is more determinately in legal custody than under the English system. There is, therefore, I think, reason to doubt the applicability of the English decisions that a landlord's right to distrain continues after an assignment
179 under the bankruptcy of his tenant.¹ But if * these au-

¹ In a case of involuntary bankruptcy there certainly can be no distress while the estate is in the custody of the marshal as messenger, and the assignee succeeds to this custody.

In the case of the estate of Samuel C. Brown, an involuntary bankrupt (21 October, 1867), this court was of opinion that rent might be paid by the assignees on the same footing as under an execution, and that an equal amount as accruing storage might be paid in addition so long as the assignee should necessarily occupy the premises.

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thorities are inapplicable, it does not follow that the so-called lien of a landlord for rent should be wholly disallowed. The proceedings in bankruptcy may then have the effect of a statutory execution so that the case of the bankrupt's landlord may be within the equity of any laws of the respective states which entitle a landlord to payment out of the proceeds of goods taken in execution. The Pennsylvania statute, following the English act of 8 Anne, c. 14, entitles him thus to receive an amount not exceeding a year's rent. Blackstone's opinion (2 Com. 487), that the landlord was thus entitled to the benefit of the analogy of the statute of 8 Anne, where he omitted to distrain, has been overruled in England only because the goods late of the bankrupt on the demised premises are distrainable in England, notwithstanding the assignment in bankruptcy. Otherwise, the case would be within the equity of the statute. This conclusion may be reached without any necessity for considering the rent as a lien properly so called.

Under the Maryland insolvent law, it has been decided that the property of an applicant for the benefit of that act is in the custody of the law and cannot be distrained, and also, that without a previous distress the landlord has no recourse against the estate. The latter part of this decision depends upon the local statute law. The statute 8 Anne, it is true, is in force in that state; but certain state laws are cited as controlling the decision there. 10 Md. 156.

In a previous case of the estate of Jeremiah M. Gale, also an involuntary bankrupt, the landlord of the bankrupt commenced summary proceedings before an alderman to recover possession of the demised premises under the Pennsylvania statute of 25th of March, 1825. Upon the petition of the assignee showing that his dispossession would be injurious to the interests of the creditors, he was, on the 19th August, 1867, authorized by this court to pay the rent, or if not in funds, to give security under the Pennsylvania statute. In this case it was desirable that the lease, fixtures, and good-will should be sold with the late stock in trade of the bankrupt.

In the case of Schell, Berger & Co., voluntary bankrupts, a provisional receiver had been appointed after the adjudication of bankruptcy and before the first meeting of creditors. He was afterwards elected assignee. But before he thus became assignee, an order upon him as receiver to pay rent was made on the 16th March, 1868, upon the landlord's petition, showing that funds were in hand which ought to be thus applied. The receiver certified that in his belief the landlord's claim was correct.

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Where the landlord makes a demand upon the assignee before the removal of the goods for an amount not exceeding a year's rent, it should, I think, if unpaid, be admitted as entitled to priority of payment, whether the right of distraining exists or not. Where more than a year's rent is demanded, the question of the existence of the right of distraining will arise. At present I intimate no opinion upon this point. The claim is allowed under the alternative view of the law which I have explained.

In cases in which assignees in good faith keep the stock in trade of a bankrupt in his former place of business, for the purpose of either economical storage or advantageous disposal, if there is no improper delay, the hire of the landlord's premises may often be fairly valued by the standard of the former rent. In such cases I have not hesitated to allow him an amount equal to accruing rent.* The cost of storage elsewhere would equitably be considered a lien.

The first question of the register is therefore answered affirmatively. The landlord's claim is allowed, but without any costs of a distress.

Upon the second question, I am of opinion that the register, if the assignee had paid the amount, would have been warranted in allowing him credit for it in the audit of the account under the 27th section of the act of congress, at the second meeting of the creditors. The allowance, as any other one, would then, of course, have been subject to exception. But I am of opinion, that a prospective payment could not have been regularly sanctioned by the register unless there had been a special reference of the question to him by the court. Even then his allowance would have been subject to exception. In all cases, however, he may refer any such question incidentally to the court, as he has done in this instance.

I understand that the questions here certified have arisen at a second meeting of creditors. The sum of one hundred and twenty-five dollars will be deducted by the register from the net amount in the hands of the assignee after all proper

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charges have been allowed. The register's own account will be settled with the assignee, and the excess or deficiency of the deposit of fifty dollars accounted for between them. The net amount will be reported for a dividend, after which the distribution of it will be reported according to Form No. 32, appended to the general order of the supreme court.

The remarks in the last paragraph are made in answer to inquiries by the register in a letter to the clerk.

Recurring to the main point in question, it may be added, that the bankrupt law of 1867 does not, in general, vest in the assignee any more beneficial interest in the debtor's estate than his execution creditors could, under the laws of the respective states already in force, have obtained under adversary proceedings. General conformity of procedure in this respect in the federal courts, and in those of the several states, had been previously attained through the act of congress of May 19, 1828 (4 Ll. U. S. 281), and the rules and practice of the federal courts adopted from time to time, under the authority conferred by this act. The system of bankruptcy is, in a relative sense, uniform throughout the the United States, when it operates uniformly upon whatever would thus have been available to the recourse of execution creditors if the bankrupt law had not been enacted. My views to this effect have been explained in a former opinion. The assignee in bankruptcy will, in the present case, obtain what would have been obtainable for the benefit of an execution creditor under the law of Pennsylvania. That less, or more, may, perhaps, be obtainable in another state, does not prevent the operation of the bankrupt law from being, in a constitutional sense, uniform.

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In re Isaac Seckendorf.

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An adjournment without day of the proceedings under a petition for discharge terminates those proceedings, so far as any action under the order to show cause is concerned. The time to examine witnesses does not expire by the bankrupt filing his petition for a discharge. The time to file objections can be kept open by adjourning any day which may be fixed for showing cause, until a reasonable time has elapsed for the examination of witnesses.

In re ISAAC SECKENDORF.

I, EDGAR KETCHUM, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and is stated and agreed to by the counsel for the opposing parties, to wit: Mr. Du Bois Smith (substituted for Mr. Kaufman), who appeared for the bankrupt, and Messrs. Brown & Estes, who appeared for J. Staderker, a creditor of the said bankrupt.

Facts. The petition was filed 21st November, 1861, and the first meeting of creditors was held on return of the warrant, 30th January, 1868, when this creditor made proof of his claim. On the 3d of March order was made, on application of the creditor's attorney, for examination of the bankrupt and his wife, and the respective attorneys attended from time to time, and, by consent, adjourned, without examination, seven days in March, eight days in April, and five days in May, the last the 19th of May, when the bankrupt not appearing, nor his wife, adjournment was made by the register to the 26th of May.

On the 18th of March, the bankrupt, on his petition for discharge, obtained order to show cause, &c., returnable to the 20th April. On the 15th of May, this creditor filed notice of appearance in opposition, the bankrupt's attorney being present, and saying that he did not object, but gave no consent thereto, and both attorneys then consented to postpone the said examination to 19th of May. On the 19th of May, this creditor filed his objections to the bankrupt's discharge.

In re Isaac Seckendorf.

On the 26th of May, the present attorney of the bankrupt first appeared, and showing his substitution as such, he objected in writing to the examination of the bankrupt and his wife. *First.* Because the time to examine witnesses had expired, the bankrupt having applied for his discharge. *Second.* That the time allowed to file objections of the creditor had expired. The bankrupt has not attended or taken the oath under the 29th section; nor has the assignee made return as to assets, nor have any proofs of publication of notice to show cause, &c., been filed. Nothing was done by the bankrupt on the 20th of April, required then for his discharge, and proceedings were then, after filing notice of appearance in opposition by another creditor, adjourned without day.

OPINION OF THE REGISTER.

I am of opinion that the adjournments mentioned kept open the time for appearance in opposition, and for filing objections, and for making the examinations before ordered. An affidavit by the creditor's attorney and the objections of the attorney of the bankrupt are sent herewith.

Respectfully submitted,

EDGAR KETCHUM, *Register.*

BLATCHFORD, J. The adjournment without day, on the 20th of April, of the proceedings under the petition for discharge, terminated those proceedings, so far as any action under the order to show cause against the petition was concerned. The petition for discharge remains good, but nothing can be done under it unless a new order to show cause is issued. The creditor who filed the objections to the discharge was not called upon to file them when he did, but they may stand as properly filed under the petition for discharge. All the creditors who shall have proved their debts will have a new day for filing objections, under the new order to show cause. The time to examine witnesses has not expired, and the time to file objections to the discharge should be kept open by adjourning any day which may be fixed for

In re Thomas F. Bowie.

showing cause against a discharge, until a full, reasonable opportunity, is afforded for the examination of the bankrupt and his wife, and other witnesses, if such examination is desired.

The clerk will certify this decision to the register, Edgar Ketchum, Esq.

U. S. DISTRICT COURT, MARYLAND.

Before the appointment of assignees, a petition for an injunction can be filed only by the bankrupt. After assignees are appointed, the petition should be filed by them.

United States district courts have full and adequate jurisdiction in all matters relating to bankruptcy, at law and in equity. Its jurisdiction, however, to sell real estate and pay off liens, is not exclusive.

In re THOMAS F. BOWIE.

GILES, J. In this case the bankrupt filed a petition, setting forth that several of his creditors, prior to his application for the benefit of the bankrupt act, had obtained judgment against him in the circuit court of Prince George's County (the county in which he resides), and that writs of *fiери facias* had been issued on said judgments, which had been levied on all his real estate; that said judgment creditors are proceeding to enforce these said claims against him, both at law and in equity, and that they are about to obtain a decree on the equity side of the said circuit court of Prince George's County, to sell all his said lands, with a view to have the proceeds of the same marshalled amongst the several judgment creditors, according to their priority of liens. All of which he claims to be in derogation of his rights under the bankrupt act, and of the exclusive jurisdiction of this court in the matter: and he prays for an injunction to be issued against the said judgment creditors, enjoining them from the enforcement of their said liens in the courts of the state; and from any further proceeding in the cause now

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pending in the circuit court of Prince George's County, as a court of equity.

By an order of this court passed May 18, 1868, this petition was set down for hearing on Monday, June 1st, and public notice of the same was given. The said judgment creditors appeared by counsel on the day named, and filed their answer to the said petition, in which they allege several reasons why the prayer of the said petition should not be granted.

First. That, inasmuch as said petition was filed after the appointment of assignees of said bankrupt, in whom all the rights of property of the said bankrupt became vested, he, the said bankrupt, had no standing in court, and no interest in the matter whatever, and that such application could only be made by the assignees.

Second. That this court has no jurisdiction in the premises; that such relief could only be sought and obtained in the circuit court of the United States for this district; that, inasmuch as these defendants have not filed their claims against said bankrupt, and are not in any way parties to the said bankrupt proceedings, they cannot be made parties, and be restrained from exercising their lawful rights, by any proceeding in the bankrupt's case, but they can only be proceeded against by process duly issued from said circuit court upon a bill filed therein.

Besides these objections to the petitioner's right, and to the jurisdiction of the court, the respondents aver, that the judgments they hold are the oldest judgments against the said petitioner, and that the amount due on them far exceeds the value of the real estate of the said petitioner; and that by no possibility will anything remain for the general creditors.

Various other matters are set forth in the said answer, which in the view I take of the case, it is not necessary for me to refer to. But the answer states, that, from the fact of there being so many executions on judgments against said petitioner, * and in the hands of different sheriffs, 186

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it was found necessary to file a bill on the equity side of Prince George's county court, to which all the lien creditors, and the petitioner and his assignees, are made parties, to procure a decree for the sale of the real estate of said petitioner, and a distribution of the proceeds of said estate among said lien creditors according to their several priorities, and that a decree will shortly be obtained for that purpose unless they are restrained by the action of this court.

This case was fully and ably argued by the petitioner, his counsel, and the counsel for the lien creditors.

In reference to the first objection, I would only say, that if the facts presented by the petition and answer justified the court in granting the relief sought, I would direct the petition to be amended, making the assignees parties to the same. Before the appointment of assignees, such a petition could only be filed by the bankrupt; after assignees are appointed, it should be filed by them, and if, in a case requiring such a proceeding, the assignees should neglect or refuse to institute it, the bankrupt could make this known to the court, and the court could either remove the said assignees or direct them to proceed in the matter.

In reference to the second objection taken by the respondents, I am clearly of the opinion that the petition was properly filed in this court; and that this court has, by virtue of the 1st section of the bankrupt act, full and adequate jurisdiction over all matters relating to the settlement of the bankrupt estate, either at law or in equity, by way of petition or bill; and that, whenever a case is presented which shows that the relief sought by the petition is absolutely necessary to protect the interest of the general creditors, and to save from sacrifice the estate of the bankrupt, such relief will be granted.

Now is this case one of that character?

It is stated in the answer, was also stated in argument, and not denied by the petitioner, that the amount now due on the judgments against him, far exceeds the value of his real estate; and that in no event can there be any surplus for distribution among the general creditors.

In re Thomas F. Bowie.

Why, then, should this court interfere? Its jurisdiction to sell said real estate and pay off said liens is not exclusive; I think this clearly appears from the 14th and 28th sections of the bankrupt act. By the 14th section the assignee is to defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy; and by the 28th section the assignee is to be allowed in his account for the fees, costs, and expenses of suits, &c. The 6th section of the bankrupt act of 1841 gave ample jurisdiction to this court over all matters connected with the due settlement of the bankrupt's estate; and while the supreme court held, that, in a case like the present, the district court had full jurisdiction to bring all parties in interest before it and marshal the assets, there was nothing in the act which required that it should in all cases be absolutely exercised; on the contrary, when suits are pending in the state courts, and there is no suggestion of fraud, and nothing appears which requires the equitable interference of this court to prevent mischief or wrong to the general creditors, or a waste or misapplication of the assets, the parties may well be left to proceed with such suits, &c.

Therefore, while in the case *Ex parte Christie*, 3 Howard, 292, the supreme court sustained the action of the district court, which had granted relief in the premises, it denied relief in the case of *Norton's Assignee v. Boyd & others*, 3 Howard, 434.

A similar decision was made by Judge McLean in his circuit, in the case of *McLean v. Rockey & others*, 3 McLean Rep. 235.

These decisions settle the law of this case, and give to us the rule by which we are to be guided in all similar applications. The petition filed in this case is therefore dismissed.

In re Edward Bigelow et al.

U. S. DISTRICT COURT, E. D. NEW YORK.

vide supra Creditors can exhibit and substantiate their claims against bankrupts, so as to comply with the requirements of the 22d section of the bankrupt act, without previously ascertaining the value of securities which they may hold.

6-6-13. R. 183 No permission for them to sell such securities conceded to be the property of the bankrupt, should be granted until their right to do so is shown in the manner prescribed by said section.

In re EDWARD BIGELOW, DAVID BIGELOW & NATHAN
KELLOGG.

BENEDICT, J. This is an application on the part of the National Bank of the Commonwealth, for an order directing the sale by the bank of certain stocks belonging to the above named bankrupts, which the bank claims to hold as security for the indebtedness of the bankrupts to the bank.

The application is founded upon a petition setting forth that the bank is a creditor of the bankrupts to the extent of \$31,880, as security for which it holds certain stocks pledged by the bankrupts, the value of which is uncertain, and as to which the assignee in bankruptcy declines to agree; and the petitioners therefore pray for an order to sell said stocks in accordance with the provisions in the 20th section of the bankrupt act, which declares that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct."

The application is strenuously opposed by the assignee in bankruptcy, principally upon the ground that it is premature, inasmuch as the petitioners have taken no steps whatever to exhibit or prove their debt in the manner required by the 22d section of the bankrupt act.

The question thus raised I have considered with some care,

In re Edward Bigelow et al.

because of the very positive opinion expressed by the intelligent counsel of the petitioners, that, if the application of the petitioners be now denied, it will be impossible for them to make proof of their debt without by that act releasing their right to the securities which they claim to hold.

This opinion, I am satisfied, by an examination of the various provisions of the bankrupt act, is erroneous ; and I am also satisfied, that, in the present posture of the proceedings, the application of the petitioners cannot be granted.

According to the plain words of the very provisions of the 20th section which gives power to make the order here prayed for, the right to the order is made to depend upon certain facts, namely: the existence of a debt owing to the creditor from the bankrupt, by virtue of which the creditor is to be admitted to share in the distribution of the bankrupt's estate, and the existence in the hands of the creditor of securities pledged by the bankrupt to secure the payment of that debt.

How these facts shall be made to appear is not provided in the 20th section, but is provided in the 22d section. According to the 22d section, any creditor desiring to be admitted to share in the estate of the bankrupt, by virtue of a debt owing him from the bankrupt, must exhibit his claim in a deposition, setting forth the consideration thereof, and the securities, if any, held therefor. Upon this deposition a hearing may be had, and testimony offered both in support of, and in opposition to, the averments of the deposition ; and an adjudication is to be thereon made. But it will be noticed that the value of the securities, which may appear to be held by the creditor, is not required by the act to be set forth in the deposition, and that Form 21 only requires an estimate of that value to be made. The value of the securities forms no part of the issue which the deposition tenders, nor is it a fact of any importance to be known until it shall appear that there is a valid indebtedness and that such property is held as security therefor. These facts having been made to appear, and it being thus determined that the person claiming

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to be a creditor is in fact entitled to share in the distribution of the estate, it then becomes necessary to ascertain the value of the property of the bankrupt which the creditor is entitled to hold, in order, by charging that value against the indebtedness shown to exist, to fix the amount which is to be allowed as the creditor's debt for which he is entitled to be admitted to share in the distribution of the assets.

The mode of ascertaining this value is given in the portion of the 20th section above cited, and when this value has thus been ascertained and deducted from the indebtedness proved, then the debt of the creditor is proved within the meaning of the 20th section.

As used in that section, the word debt means the amount upon which the dividend is to be computed, and the phrase "prove his debt" is equivalent to the phrase "share in the distribution of the assets."

A creditor does not prove as against the estate, or offer to so prove, the whole indebtedness of the bankrupt exhibited in his deposition, when against that indebtedness are set out securities held therefor, the value of which, when ascertained, the court is asked to deduct from the indebtedness in order to arrive at the balance of the account, for which balance alone the creditors seek to be admitted to share in the distribution of the assets; and I fail to find any provision in the bankrupt act which declares that the exhibition of such a deposition, and proving the facts which it avers, if it be contested, will invalidate the right of the creditor to the securities which he is found to hold.

But it is said that the 20th section declares, that, if the security be not sold or released, the creditor shall not be allowed to prove any portion of his debt, and therefore that the sale asked for is a necessary precedent to any attempt to exhibit claim to be a creditor. I have above stated that this clause does not, in my opinion, refer to the exhibition of the claim required by the 22d section, but refers to the right of the creditor to have his debt placed on the list as entitled to draw a dividend. But, if this be not so, it is by no means

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certain that the clause is applicable to any case but one where the value of the property exceeds the sum for which it is held as security, which is not the case here; and, besides, if the clause be applicable to this case, it certainly does not declare that if the creditor does not prove his debt he shall lose his security. And inasmuch as in this case the assignee, who is the only person opposing, insists that the petitioners * can and must prove their debt, it 187 would seem that the clause could be no impediment to the petitioners.

My conclusion, therefore, is that the petitioners can exhibit and substantiate their claim against these bankrupts, so far as to comply with the requirements of the 22d section, without previously ascertaining the value of the securities which they hold, and that inasmuch as their right to the proceeds of their stocks, which they concede to be the property of the bankrupts, is dependent upon their ability to show themselves to be creditors, and to hold this property as security, no permission should be granted them to sell the property until their right to do so is shown in the manner required by the 22d section of the act. To grant that permission now would be to assume the existence of facts which may never be made to appear, for it cannot now be known that the petitioners will ever seek to participate in the proceedings in bankruptcy; or if they do, that upon the hearing it will be adjudged that they have any debt, or if they have, that these stocks were pledged to them as security therefor; and what title would be conveyed by a sale made under such circumstances, in the event of its being adjudged, in the bankrupt proceedings, that the petitioners were not creditors of the bankrupts, or that they did not hold these stocks of the bankrupt as security for any debt?

To grant that permission would be to assume as proved the facts upon which the right to the order is, by the act, made dependent, and yet make the order for the sole reason that these same facts have not been, and cannot now be, proved.

In re Andrew P. Van Tuyl.

I must confess my inability to see how such action can be properly required of the court.

The motion is therefore denied.

James Emott & E. H. Pomeroy, for motion ; *P. Cantine*, opposed.

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A bankrupt having testified that he is not the owner of certain property, questions relating to the identity of the owner, duration, extent, and character of the ownership of *that* property, are irrelevant. Questions relating to the value of furniture and fixtures, and whether a certain person or persons do not own certain property, are, unless the bankrupt is in both instances the owner, irrelevant. All questions which on their face relate to property that does not belong to the bankrupt, are irrelevant.

In re ANDREW P. VAN TUYL.

THE undersigned, register in bankruptcy, having in charge the proceedings in this bankruptcy, hereby certifies, that on the 5th day of June, 1868, on the application of James M. Tighe, the assignee of the estate and effects of the said bankrupt, the undersigned granted and issued an order requiring Andrew P. Van Tuyl, the bankrupt above named, to attend before the undersigned on the 8th day of June, 1868, at eleven o'clock in the forenoon, to submit to the examination required by the 27th section of the bankrupt act. That on the said 8th day of June, 1868, the said Andrew P. Van Tuyl attended in person, and by Mr. Brown his counsel, before the undersigned, and the said assignee by Mr. Watson his counsel also attended ; that the said Andrew P. Van Tuyl having taken the oath hereto annexed, the examination of the said Andrew P. Van Tuyl was proceeded with. That the said examination of the said Andrew P. Van Tuyl is hereto annexed, subscribed by the undersigned, and in the course of the said examination, the questions arose which are set forth in the said examination hereto annexed.

ISAAC DAYTON, *Register.*

In re Andrew P. Van Tuyl.

* Andrew P. Van Tuyl, the bankrupt above named, 194 being duly sworn and examined pursuant to the order of the court, deposes and says :

Q. Where do you reside, and who owns the house ?

A. I reside at 160 Hewes Street, Brooklyn. I do not own the house.

Answer objected to as not responsive to the question.

Question objected to.

Q. Do you know who does own the house you live in ?

A. I think I do.

(1.) Q. Will you state who does own that house ?

A. No, sir, unless compelled to.

Q. (By Mr. Watson.) Why not ?

A. Because I do not wish to involve others in my troubles.

Mr. Watson, on behalf of the assignee, insists upon an answer, and Mr. Van Tuyl declines to answer as to who owns the house. Mr. Watson asks that the question may be certified to the court.

(2.) Q. Does your wife own the house you live in ?

A. I decline answering that question.

Mr. Watson, on behalf of the assignee, insists upon an answer, and Mr. Van Tuyl declines to answer as to whether his wife owns the house. Mr. Watson asks that the question may be certified to the court.

(3.) Q. If you know, how long has the present proprietor owned the house you live in ?

Question objected to as to form.

A. I decline answering that question.

Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

Q. Have you ever owned the house you now live in ?

A. No, sir.

Q. How long have you lived in it ?

A. About two years.

Q. Have you ever paid any rent for it, if so, to whom, and how much ?

A. I have never paid any rent for it.

In re Andrew P. Van Tuyl.

(4.) Q. State, as near as you can, the value of that house?
Question objected to as irrelevant.

A. I decline answering it, as irrelevant.

Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

(5.) Q. State as nearly as you can the value of the furniture and fixtures in the house you live in?

Question objected to, as to form and matter.

A. I decline answering, as the question is irrelevant.

Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

Q. Have you ever owned any interest in the house you live in, or in the furniture and fixtures in that house?

A. No, sir, except what has been set forth in my schedule.

Q. What is your profession, business, or occupation?

A. I am clerk for my brother, De Witt C. Van Tuyl.

Q. In what business? State fully.

A. Manufacturer and dealer in iron foundry materials at 273 Cherry Street, New York.

Q. Are you engaged in any real estate transactions; if so, how and in what capacity? Please state fully.

A. I am not engaged in any real estate transactions.

Q. Have you in any way been connected with real estate transactions, or business, either as agent or principal within the last year?

A. Not that I remember of, except the land that was put into the schedule.

Q. Have you, within that time, had anything to do with renting property?

A. No, sir.

Q. Do you keep, or have you recently kept, a carriage?

A. I have not.

(6.) Q. Has any one in your family kept horses and a carriage recently?

Question objected to.

A. I decline to answer.

Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

In re Andrew P. Van Tuyl.

(7.) Q. Does your wife, or any member of your family, now keep horses and a carriage, which you are in the habit of using?

Question objected to.

A. I decline answering.

Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

Q. Have you any interest in any real estate, or have you disposed of any such interest within the last year, if so, what and to whom?

A. I have no interest in any real estate, nor have I disposed of any within the last year, except what is specified in my schedule, that I know of.

Q. State the full name of your wife, and of any adult child, if any you have.

A. My wife's name is Elizabeth. I have no adult children.

(8.) Q. Is your wife possessed of any property, if so, what property? State fully.

Question objected to.

A. I decline answering.

Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

Q. Have you sold any property to any person, within the last year, which is now possessed by your wife?

A. No.

(9.) Q. Is not your wife the reputed owner of real estate and personal property to the amount of forty or fifty thousand dollars?

Question objected to.

A. I decline to answer.

Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

(10.) Q. Are you not now, and have you not recently been acting as the reputed agent of your wife in business transactions?

A. I have not acted as my wife's agent in any transaction wherein I had any personal interest.

In re Andrew P. Van Tuyl.

Q. Question repeated.

The bankrupt refuses to make any other answer.

Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

Q. In what business, or occupation, were you engaged at the time of incurring the indebtedness represented in your schedule, or a major part of it?

A. I was engaged in the foundry material business.

Q. Is it the same place, and the same business you are now employed in as clerk?

A. Yes.

Q. When did you dispose of that business, to whom, and for what price?

A. My factory was burned and all the contents to the extent of all I was worth, and left me with these debts unsatisfied. This fire occurred in 1857.

Q. Did you collect any insurance, if so, how much. Did you own the land, if so, when and to whom did you dispose of it?

A. I did not collect any insurance. I did not own the land.

Q. How long have you been clerk for your brother; at what salary; what is his name?

A. I have been clerk for my brother since the 1st of January, 1867. My salary is twenty dollars a week. His name is De Witt C. Van Tuyl.

Q. Does your brother take any personal part in the management of the business?

A. He does.

Q. Was the property spoken of as burned insured? if so, for how much, and in what companies; what became of the insurance money?

A. It was insured in the Hamilton Insurance Company of New York, for two thousand dollars; in the Merchants' Insurance Company of Philadelphia, for two thousand dollars; and the Union Insurance Company of Athens, Pennsylvania, for fifteen hundred dollars; this is all, to the best

In re Andrew P. Van Tuyl.

of my recollection. The Hamilton insurance for two thousand dollars was assigned to Henry Young for the benefit of creditors. The other two companies failed, and have never paid anything.

Q. Why do you not pay rent for the house you live in?

A. The owner allows me the use of it without charge.

(11.) Q. Who do you refer to as the owner?

Question objected to.

A. I decline to answer.

Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

(12.) Q. Do you refer to your wife as owner?

Question objected to.

A. I decline answering.

Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

(13.) Q. Is not your wife in the receipt of a large income, amounting to thousands of dollars annually, from rents, dividends and other sources?

Question objected to.

A. I decline answering.

Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

Adjourned to Thursday, June 11, 1868, at 11 A. M.

The foregoing examination taken, and proceedings had before me, 8th June, 1868.

ISAAC DAYTON, *Register.*

Mr. *Watson*, for assignee.

Mr. *Brown*, for bankrupt.

*BLATCHFORD, J. The bankrupt having stated 195 that he does not own the house he lives in, questions 1, 2, 3, 4, 11 and 12 are irrelevant. Question 5 is irrelevant, unless the bankrupt owns the furniture and fixtures named in it. Questions 6 and 7 are irrelevant, unless the bankrupt owns or has kept the horses and carriage referred to. Questions 8, 9, 10, and 13 on their face relate to property which

In re Louisa Heirschberg.

is not the property of the bankrupt, and are, therefore, irrelevant.

The clerk will certify this decision to the register, Isaac Dayton, Esq.

June 13, 1868.

U. S. DISTRICT COURT, S. D. NEW YORK.

The claim of an attorney for services and disbursements, is not a claim to be paid in full under section 28 of the bankrupt act.

In re LOUISA HEIRSCHBERG.

I, ISALAH T. WILLIAMS, one of the registers in said court in bankruptcy, do hereby certify, that, in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the respective parties, to wit: Mr. Henry Morrison, who appeared for the bankrupt, and Mr. Albert Smith, who appeared for the assignee appointed by the creditors of the said bankrupt, who requested me to certify the same to the judge for his decision.

The bankrupt filed her petition on the 28th day of January, 1868, and was adjudicated bankrupt on the 29th of the same month.

Her schedules show trade debts to the amount of \$1,563.32, of which debts to the amount of \$1,073.47 have been proved. The assets of the estate after the assignee's and other expenses have been paid, show a balance of \$182.29, to divide among the creditors.

In addition to the debts above mentioned, the bankrupt has inserted in schedule A, No. 1, the following as a debt to be paid in full, according to the provisions of the 28th section of the act.

"Morrison, Lauterbach & Spingarn, New York city, attorneys, \$250 in January, 1868, for legal services in preparing the petition and schedules and advice in relation thereto."

In re Louisa Heirschberg.

Messrs. Morrison *et al.* have filed satisfactory proof of their said claim.

To this claim the creditors and their assignee object, on the ground that the bankrupt ought to find means to pay the expenses of her bankruptcy proceedings from other sources, and that the claim is not for the fees and expenses of suits, and the several proceedings in bankruptcy under the act, within the meaning of the 28th section of the act.

On the other hand, it is insisted that the only unobjectionable course that lay open to them was, to put in their claim for services in filing the petition, &c., and disbursements in the bankruptcy proceeding as a preferred debt. The bankrupt having no means of paying them, except out of the property which she was bound to surrender to her creditors, they were bound, in fairness, to deliver all up in the first place, and then claim to be paid for their services and disbursements therefrom.

They further state that their disbursements in the matter have been over \$100, and that so far at all events, whatever may be said as to their claim for services, their claim is for costs in the proceedings, allowed priority by the 28th section of the act.

It occurs to the register to remark, that the conduct of Messrs. Morrison, Lauterbach & Spingarn in the matter seems to have been conscientious, perhaps more so than the course ordinarily pursued by solicitors in such cases. It is clear that the funds from which the solicitor is paid, must come from what should be the assets of the bankrupt, or from his future earnings. In pursuing the course here pursued, the solicitor submits the amount of his compensation to the court under the eye of the creditors. In the course ordinarily pursued he obtains his compensation from the same fund, the amount being measured by the good feelings of the bankrupt, and under some temptation to give him a larger sum than the creditors would sanction, or the court might think a just compensation.

If the act will bear this construction, it would seem to tend

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to a better practice than that which it is believed now generally prevails. Respectfully submitted,

I. T. WILLIAMS, *Register*.

BLATCHFORD, J. I do not think that the claim in question, or any part of it, even to the extent of the disbursements embraced in it, is a claim to be paid in full under section 28 of the act. The fees, costs, and expenses named in the first of the five subdivisions in section 28, are those incurred by and due to the register, clerk, assignee, and marshal, and not those incurred by the bankrupt, or due to his attorney in the proceedings for services or disbursements in connection with such proceedings.

The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

June 20, 1868.

U. S. DISTRICT COURT, S. D. GEORGIA.

An assignment made *bond fide* twelve months prior to the filing of the petition for bankruptcy, is good against the assignees of bankrupts; the assignees, except in cases of fraud, take only such rights as the bankrupt had, and could himself claim at the time of his bankruptcy.

In re GEORGE H. ARLEDGE.

I, THE undersigned, having been designated by the court as the register in bankruptcy before whom the proceeding, in the above matter of the bankruptcy of George H. Arledge are to be had, do hereby certify, that in the due course of such proceedings the following question pertinent to the same arose, and was stated by Peter V. Robinson, assignee of the effects of the said bankrupt, namely: The said George H. Arledge, some twelve months prior to his filing his petition in bankruptcy, conveyed by deed of assignments, for the benefit of all his creditors, all his stock in trade, choses in action, books of account and property of every kind to one John H. Thomas; from the proceeds of the sale of said property a

In re George H. Arledge.

dividend of ten per cent. has been paid by the said Thomas, a balance of money, and the books of account, still remain in his hand.

Is the said assignee in bankruptcy entitled to receive from the said John H. Thomas the money and property not yet distributed among the creditors?

And the said party requested that the same should be certified to your honor for your opinion thereon.

FRANK S. HESSELTINE,

Register in bankruptcy for said district.

OPINION OF THE REGISTER.

It is my opinion that the assignee is not entitled to recover the said money and books of account in the hands of the said John H. Thomas.

The deed of assignment conveys to the assignee "all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bankruptcy." The bankrupt act, section 14 (Rice's Manual, general clause 46). By this clause of the bankrupt act it appears that all the property of *the bankrupt* — the title and right to which was in the bankrupt at the time of filing his petition — and that only, passes to the assignee. Property which previous to that time had been lawfully conveyed or assigned to any person by the bankrupt does not pass to the assignee, the title having gone out of the bankrupt and become vested in the person to whom it was conveyed or assigned. The assignee acquires by the deed of assignment the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the property or estate as the bankrupt might or could have had if no assignment had been made. Bankrupt act, section 14, general clause 52, Rice's Manual.

By section 35 of the act a conveyance or assignment, made by a person being insolvent within four months before the filing of the petition by, or against him, of any part of his

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property, a person having reasonable cause to believe such a person insolvent, with a view to give a preference to any creditor ; or a like conveyance within six months before the filing of the petition, with a view to prevent the property from coming to his assignee in bankruptcy, or to defeat the object of, or in any way impair, or delay the operation of this act, &c., are void, and the assignee may recover the property, or the value of it.

This section does not apply to this assignment, made more than twelve months before the filing of his petition by the bankrupt, and made for the benefit of all his creditors.

In the case of *Mitchell v. Winslow et al.* 2 Story C. C. Rep. 631, Justice Story says : "that it is a well established doctrine that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy."

Lord Hardwicke, in the case of *Brown v. Heathcote*, 1 Atkyns Rep. 160-162: "The ground that the court go upon is this, that assignees of bankrupts, though they are trustees for the creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could ; therefore assignments of choses in action for a valuable consideration have been held good against such assignees."

In the case of *Mitford v. Mitford*, 9 Ves. 87, 100, Sir William Grant said : "I have always understood the assignments from the commissioners, like any other assignments by operation of law, passed his (the bankrupt's) rights precisely in the same plight and condition as he passed them." See, also, *Bedford et al., assignees of Cohen, a bankrupt, v. Perkins*, 3 C. & P. 90 ; 1 Bing. Rep. 1-50 ; 2 Moore, 336 ; 9 Bing. 372.

The said Arledge's right and interest in this property claimed by the assignee, ceased on the execution of the deed of assignment to Thomas, subject to the condition that if, after the payment in full of the creditors, there should be a balance in his hands, that remainder would be the property of

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Arledge, and the right to receive that remainder is all the right his assignees in bankruptcy acquired by the deed of the register. That is the reason why the forms of proceedings in bankruptcy adopted by the supreme court of the United States require that property previously conveyed should be set forth under the heads of Property in Reversion, Remainder and Expectancy, Schedule B 4.

There has been no claim proved against this bankrupt, and he has petitioned for his discharge.

FRANK S. HESSELTINE, *Register*.

ERSKINE, J. The decision of the register is affirmed. The clerk will certify accordingly.

*U. S. DISTRICT COURT, N. D. FLORIDA.

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A corporation created for the purpose of carrying on any lawful business, defined by its charter and clothed with power to do so, is such a corporation as is contemplated by the bankrupt act. Any debt, which may be proved by complying with any of the provisions of the bankrupt act, is a provable debt; suffering a sale to take place from inability to resist is not an act of bankruptcy, even if by so doing one creditor should be preferred to another. After the passage of the so-called ordinance of secession, all acts passed by any pretended legislature are void. The government organized in the states lately in insurrection, by direction of the president, are by act of congress declared provisional with full power to execute such laws as were in force prior to the passage of the so-called ordinance of secession. A sale by the trustees under the provisions of the internal improvement act of Florida, of the stock, franchises, &c., of a corporation organized agreeable thereto, is not an act of bankruptcy.

Petition dismissed with costs.

RANKIN & PULLAN *et al.*, *Petitioners*, v. THE FLORIDA, ATLANTIC AND GULF CENTRAL RAILROAD COMPANY.

THE petition in this case sets forth —

First. The amount and nature of the debt due the petitioners, and that said debts are provable in bankruptcy.

Second. That the Florida, Atlantic and Gulf Central Railroad Company, a corporation created by the laws of the

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State of Florida, having its principal office at Jacksonville and carrying on its business as such corporation within the Northern District of Florida, being in contemplation of insolvency, did, on the 10th day of January, 1868, transfer the said railroad and its appurtenances to the management of the Pensacola and Georgia Railroad Company, with intent to delay creditors.

Third. That on the 29th day of January, 1868, the said company, in contemplation of insolvency, did make a transfer of two engines—"Lee" and "Stonewall"—to Messrs. Reed & Hooper, creditors of the company, with intent to prefer said creditors, and J. P. Sanderson and J. S. Sammis, sureties.

Fourth. That said company, in contemplation of insolvency, did, on the said 29th of January, make a transfer of one of said engines, that the same might be sold and the proceeds applied to the payment of said debt, with intent to prefer John P. Sanderson and John S. Sammis, indorsers, and with intent to defeat the operation of the bankrupt act.

Fifth. Same as the fourth, with intent to delay the operation of the act, and to prefer J. P. Sanderson and John S. Sammis, sureties.

Sixth. That on the 10th day of January, 1868, the said company, in contemplation of insolvency, did transfer to J. S. Sammis \$20,000 of the coupons cut from the first mortgage bonds of said company, to be deposited with Reed & Hooper, as collateral security for their demand, with intent to prefer Reed & Hooper and J. S. Sammis, surety, and to delay the operation of the bankrupt act.

Seventh. That on the 29th day of January, 1868, said company being insolvent and indebted to the trustees of the internal improvement fund of the State of Florida in many thousands of dollars, an arrangement was entered into, in violation of this act, between said insolvent corporation and persons claiming to be the trustees of the internal improvement fund, Edward Houston, president of the Pensacola and Georgia Railroad, acting as such president and as agent

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of William E. Jackson and others, first mortgage bondholders of the Florida, Atlantic and Gulf Central Railroad Company, confederating to hinder and delay the operation of the bankrupt act, and with intent to prefer certain creditors holding first mortgage bonds of said company, and with further intent to relieve the president and directors of their liability to pay the amount due the trustees on account of the sinking fund, and did cause a sale to be made on the 4th day of March, 1868, by the trustees of the internal improvement fund, of all the property of every kind and character of said company, including the franchise thereof, for a consideration, in violation of law, Edward E. Houston being purchaser as agent, &c., knowing said company to be insolvent, and with intent to defeat the operation of the bankrupt act.

Eighth. That said company, on the 3d day of February, 1868, being insolvent, did transfer its property and franchise so that the trustees of the internal improvement fund did, by the sufferance of said company, and by its transfer, sell all the property of every kind belonging to said corporation for a sum far below its value, to wit, \$111,000, and the further consideration that the purchaser was to put the road in repair and run the same with their trains; that at said sale Houston, as president and agent as aforesaid, became the purchaser, the trustees and purchaser having reasonable cause to believe that said company was insolvent, such sale having been made with intent to defeat the operation of the bankrupt act.

Ninth. That the said company, the trustees and the purchasers, were acting in violation of the act and for the purpose of giving preference to creditors, and did jointly procure and cause such sale to be made on the 4th day of March, 1868, of all the property and franchise of said insolvent corporation, in violation of law, of the said act, and with intent to prefer creditors, and to delay the operation of the act.

Tenth. That said company, on the 29th day of January, 1868, being insolvent, did instruct and fully authorize the president to execute the agreement between said insolvent

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corporation and the Pensacola and Georgia Railroad Company, in reference to the sale of said road and franchise by the trustees of the internal improvement fund, which sale was made on the 4th of March, 1868, in violation of the bankrupt act, and for the purpose of giving a preference to certain creditors who became the purchasers, and for whose benefit said sale was made, all parties having at the time reasonable cause to believe that said company was insolvent; said Edward Houston, agent for William E. Jackson and others, being the purchaser.

Eleventh. Prayer for an injunction to prevent execution of titles or the completion of the sale, and enjoining the payment of the purchase money, and enjoining said company from making any disposition of its property until a final adjudication of this proceeding.

FRASER, J. The respondent puts in an answer denying all the charges and allegations contained in the petition, and alleging that said corporation is not amenable to the bankrupt act, because it belongs to a system or network of state improvement and policy, and cannot be considered a private corporation. It is alleged, on the part of the debtor, that this is not such a business corporation as is contemplated by the bankrupt act, and therefore cannot be made amenable to that law and adjudged a bankrupt. A corporation created for the purpose of carrying on or pursuing any lawful business, defined by its charter and clothed with power so to do for the sake of gaining, is clearly such a corporation. Now this corporation is a common carrier, takes tolls, purchases, sells and mortgages property, contracts debts and other obligations, may sue and be sued. What more is necessary to fix upon it the character of a business corporation?

It is also a private corporation. Its stock is held by private stockholders, and by the trustees of the internal improvement fund as private stockholders. See In. Im. Act, sec. 14.

It is therefore amenable to the operation of the bankrupt act.

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Are these demands of the petitioners provable debts? Any debt which may be proved by complying with any of the provisions, or upon any conditions prescribed by the act, is a provable debt. The demands of the petitioners consist of what is termed free land bonds, which are admitted to be a lien upon all bonds granted to the company for the purpose of constructing their road, and \$825 in coupons, cut from the first mortgage bonds, which are a first lien upon the road-bed and its equipments. Now the petitioners may prove their debts by abandoning their lien and proving the whole amount, or they may ascertain the value of their securities, in any manner provided by the act, and prove for such balance as may remain after deducting such value. These debts are therefore provable, and the petitioners are properly in court.

We must next inquire whether, during the six months next preceding the filing of the petition, the said corporation was insolvent or contemplating insolvency. Nearly all the witnesses testify in general terms that the company was insolvent and state, as a reason for their conclusion, that the receipts of the road were not sufficient to meet its current expenses, the floating debt, the interest on the bonds, and the sinking fund. Without further proof, this evidence would seem to establish the fact of insolvency. Other witnesses produced by the petitioners have given some certain data upon which to found a reasonable judgment. O. B. Hart testifies that mismanagement was the cause of failure to meet the liabilities of the company; that the receipts of the road were sufficient to pay the sinking fund, if the affairs of the company had been better managed. William Bryson, a former superintendent of the road, testifies upon a careful estimate made by him, that on the 4th day of March, A. D. 1868, the road-bed, rolling stock and equipments, and the property generally appertaining to the use of the road, were of the value of \$891,862.55. Mr. Daniel, the agent of the trustees for the bonds of the company, and well informed as to the value of the lands, fixes their value at \$315,000.

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These estimates will fix the value of the road and lands at \$1,206,862.55.

Mr. Maxey, the secretary and treasurer of the company, states the mortgage debt of the company on first mortgage and free land bonds to be \$755,000, and the general indebtedness not secured by mortgage, without deducting payments, at about \$85,000, making the indebtedness of the company — without deducting the \$89,000 charged against the internal improvement fund, the six or seven thousand dollars paid to Reed & Hooper, the bonds still unsold, payments to operatives, and so forth — the sum of \$840,000. Add to this sum interest on the bonded debt for three years, say \$180,000, and the entire indebtedness of the company amounts to the sum of \$1,020,000. Deduct this amount from the amount of assets and the results shows a balance in favor of the assets of \$186,862.55.

With such facts proved by the petitioners themselves, the conclusion is irresistible that the company was solvent up to the day of sale by the trustees of the internal improvement fund.

Did the said corporation, in contemplation of insolvency, make any payment, conveyance, or transfer of money or other property, estate, rights, or credits ; or suffer or procure its property to be taken on legal process, with intent to give a preference to one or more of its creditors, or to any persons liable for said corporation as indorsers or sureties, or with intent to defeat or delay the operation of the bankrupt act ?

It appears that said corporation, not having the ready money to pay the debt due the sinking fund, having
197 exhausted all its means of opposition to the * sale by the trustees, and being advised by counsel that further opposition was hopeless, did suspend its opposition, being informed at the time that the trustees had arranged with certain first mortgage bondholders that the said road and franchise should not sell for less than twenty per cent. of the whole amount of the principal of the first mortgage bonds, to wit, the sum of \$111,000, and that upon said sale the said bondholders

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should present three fourths of said first mortgage bonds for redemption and cancellation at that rate, and should receive in lieu of the interest coupons due upon the same lands belonging to the internal improvement fund. The railroad property and franchise of the corporation were sold by the said trustees on the 4th of March, A. D. 1868, and it appears that the parties are waiting the result of this examination to complete their arrangement. When complete, the indebtedness of the corporation will be reduced three fourths of the amount of principal of the first mortgage bonds, with three fourths of the estimated interest due thereon, amounting to \$486,750. Add to this the \$20,000 due the sinking fund paid out of the balance of the purchase money, and deduct the sum from the amount of the indebtedness of the corporation, and there remains a balance of \$513,250, a trifle more than one half of its indebtedness before the sale. Deduct this amount from the estimated value of the assets, and the assets of the corporation will exceed its indebtedness \$693,612.55. With such a result in view it cannot well be said that said corporation suffered or procured its property to be seized or sold in contemplation of insolvency, or with intent to prefer creditors when it leaves the remaining creditors with double the security which they had before the sale ; or that it was done with intent to defeat and delay the operation of the bankrupt act, when it placed the corporation in a condition in which it was far less liable ever to bring itself within the operation of that act. It would seem that if it did suffer or procure the sale to be made, it did so in contemplation of a higher degree of solvency and not of insolvency : but the evidence shows that it did not suffer the sale to take place, except from inability to resist.

But it is objected that this sale is void, there being on the 4th of March, 1868, in the State of Florida, no legal state officers authorized to act as trustees under the provisions of the internal improvement act of the state. It is true that upon the passage of the so-called ordinance of secession, passed in convention on the 10th day of January, 1861, which was

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the opening of hostilities by the State of Florida against the government, a legal state government in the State of Florida ceased to exist. It follows as a necessary consequence that after that date all laws passed by any pretended legislature were and are absolutely null and void. At the cessation of hostilities the government found here an organized government, deriving no authority from, and not organized under, the Constitution of the United States.

The people of the state afterwards undertook, by the direction of the president, but without the sanction of the general government, to restore the state to its former relations to that government, by adopting the new Constitution not hostile to it, and professedly working under the Constitution of the United States. This government was declared illegal by congress ; but, with its accustomed wisdom and beneficence, congress saw fit to vitalize and adopt it "as provisional only," in order to keep dormant the destructive forces of anarchy. The governor and other officers of the state thus recognized could, in virtue of such recognition, execute such laws only as were in force on the 10th day of January, 1861, and which are not repugnant to the Constitution and laws of the United States. For such purpose and for such alone, they are state officers, as completely invested with power to execute such laws as if legally elected, with the exception that their acts are subject to revision by the military commanders of the district. Now the act entitled "An act to provide for and encourage a liberal system of internal improvements in the State of Florida" became a law in January, 1855. It follows, then, that the governor, the comptroller, the state treasurer, the attorney general, and the register of public lands as trustees of the internal improvement fund, might, by virtue of the authority with which they were invested by the internal improvement act, and for the causes and purposes set forth in that act, take possession of and sell said railroad and all its property of every description, and that a sale made by them in pursuance of the provisions of that law is valid.

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It will be proper here to inquire what is the effect of the sale by the trustees upon the corporation and its liabilities, in order to ascertain whether its creditors are in any manner delayed or preferred, and whether, in any aspect, such sale is a fraud upon the bankrupt act.

First, then, does the sale by the trustees of the franchise and other property of the corporation work its dissolution?

Second. Are the liens upon its property divested and its debts extinguished?

Third. If not dissolved, does it continue to be the same corporation, exercising the same powers, under the same charter as before the sale?

Fourth. If transformed by the sale into a new corporation, from what law does it derive authority to exercise corporate power?

Fifth. If it remains the same corporation, clothed with all its powers and privileges under the charter, by what law is it released from the payment of its debts?

Sixth. If not released, what law prevents the creditors from enforcing their demands against the corporation?

The first section of the charter provides that all subscribers for stock, their *successors* and *assigns*, shall be a corporation, and have and exercise corporate powers, they and their successors and assigns, without limitation.

The fourth section provides that the directors elected by the stockholders shall continue in office one year *and until* new directors shall be elected; and if from any cause whatever there should at any time be no election of directors, the corporation shall not, for that cause, be dissolved, but the directors and other officers then in office shall continue, with all the powers herein mentioned, until an election of new directors can and does take place.

The tenth section provides that all the property of the company and all the works constructed under the authority of this act, and all profits which shall accrue from the same, shall be *vested* in the *stockholders* of the company *forever*, in proportion to their shares.

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The thirteenth section provides that all property assessed and paid for, agreeably to the provisions of this act, and all donations made to and for the same, shall *forever* afterwards belong to and become the property of said company, its *successors* and *assigns*, in fee simple, in proportion to the number of shares owned by the *stockholders* respectively.

The fourteenth section provides that the stock of said company, and all the property belonging thereto or which may from time to time be acquired by said company, shall be held *jointly* and not separately.

It is clear, from these extracts from the charter, that the legislature intended to invest this corporation with a legal immortality, not to be dissolved by assignment or sale, and has vested a joint interest forever in the stockholders in all its property and stock. The third section of the internal improvement act provides that "all bonds issued by any railroad company under the provisions of this act shall be a first lien or mortgage on the road-bed, iron, equipments, workshops, depots and franchise; and upon a failure on the part of any railroad company, accepting the provisions of this act, to provide the interest as herein provided in the bonds issued by said company, and the sum of one per cent. per annum as a sinking fund as herein provided, it shall be the duty of the trustees, after the expiration of thirty days from said default or refusal, to take possession of said railroad and all its property of every kind, and advertise the same for sale at public auction to the highest bidder, either for cash or *additional* approved security, as they may think most advantageous for the interest of the internal improvement fund and the *bondholders*. The proceeds arising from such sale shall be applied by said trustees to the *purchase* and cancelling of the outstanding bonds issued by said defaulting company, or *incorporated with the sinking fund*: Provided, that in making such sale, it shall be conditioned that the purchaser shall be bound to continue the payment of one half of one per cent. semi-annually to the sinking fund, *until all the outstanding bonds are discharged*, under the penalty of an annulment of the c.

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tract of purchase, and the forfeiture of the purchase money paid in."

Now, in the foregoing clause of the act, provision is made for a sale for cash or additional security. Additional security for what? Evidently for the bonds issued under the provisions of this act. Security additional to what? Clearly in addition to "the road-bed, iron, equipments, workshops, deposits and franchise," upon which the bonds are a first lien or mortgage.

If sold for cash, the money is to be applied to the *purchase* and cancellation, not to *pro rata payment* of the bonds, or incorporated with the sinking fund, showing the intention of the legislature to be that the lien of the bonds upon the road, its property and franchise, should not be disturbed by the sale. But if the corporation be dissolved by the sale, there remains no franchise to which such lien can attach, and the bondholders are entirely at the mercy of the trustees. We cannot think, then, that the legislature intended to dissolve the corporation by such sale, but simply to transfer its management to more efficient hands. The act looks to a continuance of the operation of the road, to the payment of the one per cent. annually to the sinking fund, and to the exercise of corporate powers by the purchasers. The sale is not a judicial one where the property goes to the purchaser divested of all liens, and where the liens follow the fund into court and seek satisfaction there, out of the proceeds of the sale. Priorities are not to be considered, liens are not to be satisfied, debts are not to be paid with the proceeds of the sale, but bonds are to be *purchased* or the money is to go into the sinking fund. The stock is part of the property of the company, and the stockholders have a joint interest therein, when sold the purchasers take such interest as the original stockholders had in the corporation and its property. In other words, the sale divests the stockholders of their interest and vests it in the purchaser. The stock simply changes hands, and I can see no difference upon principle in the effect of the sale where the stockholders make the transfer individ-

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ually or where they have agreed to another mode of transfer as in this case, where all the stockholders transfer their stock at the same time, the new stockholders take the stock
189 with all its incidents, that is, the property * and franchise of the corporation ; in other words they become and are the corporation. Now, suppose that all the stockholders agree, as in this case, by accepting the internal improvement act, that upon the happening of a certain event, certain other persons shall make the transfer for them, and the transfer is made according to the terms of said agreement by the person designated ; can any sound reason be given why the effect of the sale in one case should differ from that in the other ? Both transfer the stock and all other property of the corporation. Wherein, then, do they differ and why ? I confess that after most careful reflection and examination, I have failed to discover any legal grounds or any good reason for determining that the legal effect of the sale is not the same in both cases. If this be so, the sale by the trustees does not dissolve the corporation any more than a simultaneous transfer of stock by all the stockholders dissolves it. The corporation then continues to exist in the purchaser as it did in the stockholder before the sale. The corporation is the identical legal person, possessing all the rights, powers, and privileges, and subject to the same responsibilities and duties. It cannot divest itself of its responsibilities any more than of its powers, and remain the same corporation. There is no provision in the internal improvement act which operates to divest any lien or discharge any debt of the corporation through the sale without payment or purchase of the debt. The power of suing, and being sued, still remains a part of its franchise ; otherwise, it has no charter, no franchise, and is no longer a corporation for any purpose. If then, it retains its identity with all its original powers, by what slight of hand or illusion has it discharged itself from the payment of its debts. These debts were valid obligations of the company once ; how have they become dissolving phantoms without substance ? By what law or by what agreement have they

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been cancelled? The creditors to whom these debts were payable could once sue the corporation and recover. What law has taken away this remedy? I have been unable to discover any.

Suppose the corporation were to be sued upon a debt created before the sale, what plea could be interposed to bar the recovery? Would it be, that the franchise and property of the corporation had passed by sale into the hands of stockholders who did not create the debt, and ought not, therefore, be required to pay it? The same plea would be as effectual a bar, in behalf of new stockholders who had become possessed of stock, in any other way, since the debt was contracted. We may as well say that the human body, the whole of whose particles are said to change in seven years, is not the same body, as to say that a corporation, whose stockholders have changed, is not the same corporation. The one allegation is as absurd as the other. The charter provides that all subscribers for stock, their successors and assigns shall be a corporation, and have and exercise corporate powers. This grant is made to the original stockholders, their successors and assigns, and to none other. The purchasers at the sale by the trustees are, therefore, successors or assigns of the original stockholders, and their successors and assigns, or they cannot take and exercise corporate powers by virtue of their purchase. The sale by the trustees is a mode of assignment agreed upon between the state and the corporation, and in virtue of such sale the purchasers become the assigns and successors of the original stockholders, succeeding to all the rights, powers, duties, and liabilities of said stockholders as a corporation.

The corporation not being discharged from its debts, and those debts being reduced one half by the sale, the creditors are not delayed, but benefited, by the sale, neither is the sale a fraud upon the bankrupt act. Until new directors are elected, the present officers of the company are authorized to act. The engines "Lee" and "Stonewall" are still the property of the company, where the sale found and left them.

In re Alexander Frear.

The taking up of transportation certificates, and payment for cross-ties, were proper payments in the regular course of business. The transfer and hypothecation of coupons to Reed & Hooper, as collaterals, were properly made in compliance with the terms of a prior contract, and were not made when the corporation was insolvent or contemplating insolvency. No act of bankruptcy has, therefore, been committed by this corporation.

The prayer of the petitioners that the Florida, Atlantic and Gulf Central Railroad Company be adjudged a bankrupt must be denied.

This order came on to be heard upon petition and answer, and was argued by counsel, and the same, together with the proofs and allegations of the parties having been duly considered, and it appearing to the court that the proofs do not sustain the allegations in the petition, and that no cause for an adjudication of bankruptcy is shown thereby, it is thereupon ordered, adjudged, and decreed, that the petition of the petitioners be, and the same is hereby dismissed.

It is further ordered, that the said petitioners do pay all the costs of this proceeding to be taxed; and that the said Florida, Atlantic and Gulf Central Railroad Company do recover costs of and from said petitioners in pursuance of the 31st Rule of the General Orders in Bankruptcy prescribed by the supreme court of the United States.

April 14, 1868.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where one who was a member of a late firm files his individual petition in bankruptcy, all his creditors can prove their claims, whether individual or partnership. Partnership assets must be administered according to the 36th section of the bankrupt act, and likewise the assets of the separate estate of bankrupt.

In re ALEXANDER FREAR.

I, JOHN FITCH, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceed-

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ings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Brown, Hall & Vanderpoel, for the bankrupt; Martin & Smith, for Bauendahl & Co.; Matthews & Bretts, Chapman, Scott & Crowell, and S. T. Freeman for various creditors, also Richard J. McCurdy in person, and for Aldrich, McCurdy & Co.

I deem it the duty of the register in deciding questions involving the construction of the bankrupt act, to examine the question presented in all its bearings; examine the authorities applicable to the case, and give an opinion in the matter upon the law of the case, which will enable the district judge to decide the case by revising or affirming the opinion of the register. This course lessens the arduous duties of the district judge, and relieves him of some of the most difficult and laborious part of his duties.

On the 19th day of February, A. D. 1868, the above named petitioner filed his individual petition in the prescribed form (No. 1), praying that he might be adjudged by the court to be a bankrupt and have a discharge from all his debts provable under the bankrupt act. There is no reference in the petition to copartnership debts, but the schedules annexed show the petitioner was a member of the late copartnership firm of Alexander Frear & Co., which was dissolved more than six months prior to the filing of said petition, and a large number of debts contracted by said copartnership are set forth in said schedules, including the debt to Bauendahl & Co., and the other creditors who have proved their claims.

The petitioner has been duly adjudged a bankrupt, and at the meeting of creditors, Bauendahl & Co. presented against the estate of said petitioner, proof of a debt which was contracted by the said firm of Alexander Frear & Co.; to this the attorney for the petitioner objected, upon the ground that copartnership debts could not be proved herein, and urged that the indebtedness sought to be proved was a debt of the said firm of Alexander Frear & Co., and not his (the petitioner's) debt within the meaning of the bankrupt act.

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The attorney for said Bauendahl & Co. insisted that the fact, that others were liable with the petitioner on this debt, made no difference, that the copartnership of Alexander Frear & Co., being dissolved, the debt was the joint and several debt of the persons who composed said copartnership, that the creditor could enforce its collection from the individual property of the petitioner, and that proof of it should be received, and that a creditor has a right to prove the same. The following question of law arises thereon :

Where a person who was a member of a late copartnership, files his individual petition under the bankrupt act, praying for a certificate of discharge from all his debts, can all his creditors prove their claims against him, or are his individual creditors alone entitled to come in and prove their claims ?

Section 19 of the bankrupt act, approved March 2, 1867, allows a party to prove any debt he may have against a petitioner, but the proof of the claim or debt does not by any means conclude the petitioner, or any of the petitioner's creditors ; he, or they, may contest the claim so proved upon any legal ground authorized by law. The act expressly allows the petitioner to object to all debts barred by the statute of limitations, yet such a claim, if proved, and not objected to by the petitioner or a creditor, must be allowed by the court, and the assignee must receive it as a claim entitled to its share of the dividend ; the same rule applies to a debt which by a state law may have been discharged by a state insolvent law, which as between the citizens of the same state is binding and effectual in the state courts, and also United States courts, but not as between citizens of different states. 3 Selden, 300 ; *Kelley v. Drury*, 9 Allen, 27 ; *Baldwin v. The Bank of Newburgh*, 1 Wallace, 234, 239 ; *Worthington v. Jerome*, Justice Nelson, manuscript case.

My view of the case is this, that any claim that the creditor could prosecute and recover as against the petitioner in a suit in the district court, can be proved and must be allowed in the proceedings in bankruptcy, as the law makes the pro-

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ceedings a suit of the debtor against his creditors, merely reversing the manner of proceedings. This brings up the question: Could the creditor sue for and recover in the district, or circuit, court the debt or demand he now seeks to maintain against the objection of the petitioner? It must be allowed, as the same rule of law in regard to the debts that can be allowed in * bankruptcy must govern at the 202 circuit; as I conceive it to be plain, that, if the claimant could not obtain a judgment upon the claim, he cannot participate in the proceeds of the petitioner's estate.

By the law of this state, a partner is liable personally for the debts of the copartnership to the entire indebtedness of the firm; the debt of the firm is as much the debt of the individual as of the firm, and after the property of the firm or corporation is exhausted, and there still remain claims or debts unsatisfied, the individual property of the members of the firm or copartnership can be taken in execution to pay the firm debts. Therefore, I hold that debts due by a firm are so far the debts of each member of the firm, that any creditor of the firm can prove their debts due them from the copartnership as against any member of the firm; whether he petition as an individual, or as a member of a firm, or of a late firm; the petitioner is liable both as an individual and as a copartner; is jointly as well as severally liable upon a contract, whether made as an individual or as a member of a firm.

The discharge of the petitioner would not in any manner affect the claim of the creditor against the members of the copartnership; their claim against the others would remain the same, but should there be any money paid upon their claim, it would reduce the amount due upon the debt, by the amount so paid; the bankrupt would be discharged from the debt. It operates the same as the death of a bankrupt with no estate.

The ground taken by Brown, Hall & Vanderpoel, for the bankrupt, would not only defeat the intent of the framers of the bankrupt law, but would render the discharge of the pe-

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petitioner worthless, as he would remain indebted upon all the copartnership debts which constitute most of his indebtedness; also rendering most of the discharges in this district already granted, worthless, and laying the foundation for endless litigation.

The bankrupt law is analogous to the insolvent law of this state, known as the two third act: by that act a discharge cuts off all debts, copartnership as well as individual. The supreme court, in the wording of the form of the petition, evidently intended that the petitioner should be discharged from all his debts, individual as well as otherwise. The provisions of the bankrupt law contemplate the entire discharge of the petitioner; no reservations are made, no partial discharge provided for; all claims of whatever nature are provable. Where an action at law, or in equity, could be maintained against a petitioner, the claim upon which said action could be maintained can also be proved subject to the same defence as in a court of law.

By section 4 of the bankrupt act, the register is empowered to take proof of debts, "and all" depositions of persons and witnesses taken before said register shall be reduced to writing, be signed by him, and filed in the clerk's office of the district court, as part of the proceedings. Section 5, Bankrupt Act.

By section 8 of the bankrupt act, "any creditor whose claim is wholly or in part rejected may appeal," &c.

By section 11 of the bankrupt act, the petitioner in his petition must state his "willingness to surrender all his assets for the benefit of his creditors." His schedule must contain a full and true statement of all his creditors. Why require this to be done unless his creditors could prove their debts against his estate? The "sum due each creditor, also the nature of each debt or demand," must be stated. It is not probable that congress would have required the petitioner to set forth the name of each creditor, the amount and consideration of each debt, unless the holder and owner of the debt could prove the same, and share in the proceeds of the estate;

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“also to annex an inventory of all his assets, both real and personal.” The estate of a petitioner may consist of every imaginable piece of property, held jointly with others, and his interest therein must be taken by the assignee.

All debts due by the petitioner may be proved, and he will be discharged from them, be they individual or copartnership debts.

By section 13 of the bankrupt act, a creditor who has proved his claim may request the judge to require the assignee to give bond, &c.

Section 14 of the bankrupt act vests in the assignee all the bankrupt's property, including copartnership effects. By section 14 of the bankrupt act, the petitioner is compelled to make a transfer to the assignee of his assets; and any interest in any copartnership is an asset.

If an attachment should have been issued against the property of the petitioner, and a levy made upon the property of the petitioner, and that property have been an interest in a copartnership, such attachment, if made within six months, would be set aside, and the assignee in bankruptcy would take the effects, be they copartnership or otherwise.

For the reasons above given, and upon a careful review of the law applicable to this case, I held that the debt was provable, and allowed the claim to be proved as a debt against the estate of the bankrupt. Brown, Hall & Vanderpoel, attorneys for the petitioner, objected, and asked that the same should be certified to his honor, the district judge.

JOHN FITCH, *Register.*

BLATCHFORD, J. The debt in question is provable, whether there are any assets of the copartnership or not. If there are any such assets, they must be administered according to the provisions of section 36 of the act, and so must the assets of the separate estate of the bankrupt.

The clerk will certify this decision to the register, John Fitch, Esq.

June 22, 1868.

In re William K. Belcher.

U. S. DISTRICT COURT, S. D. NEW YORK.

Where petitioner in bankruptcy had carried on business and resided in New York for twenty years prior to June, 1866, and removed to New Jersey that year, but was still engaged as a clerk with his successors in business: *Held*, that his petition was properly filed in the district court for the Southern District of New York.

In re WILLIAM K. BELCHER.

THE petitioner filed his petition and schedules in bankruptcy, on the 19th day of February, 1868, and was duly adjudged a bankrupt.

His petition set forth that he had done business and had a place of business in the Southern District of New York, for more than six months next immediately preceding the filing of the petition, but set forth no place of residence.

The petitioner had carried on business and resided in the city of New York for more than twenty years prior to June, 1866. In the month of June in that year, he failed in business, and made a general assignment for the benefit of his creditors. He sold out his residence in the city of New York, and retired with his family to New Jersey, where they now reside upon some property which belonged to the separate estate of his wife. Immediately after his assignment he engaged as a clerk, upon a yearly stated salary, with his successors in business, and has ever since continued with them as such clerk upon such salary. All the partners of petitioner, except one, were, and now are, residents of the city of New York, and have obtained a discharge in bankruptcy in the Southern District. The petitioner's creditors are 212 in number, of whom 170 are merchants carrying on business in the city of New York. Under these circumstances, it is submitted that the petition is properly filed in the Southern District of New York.

PLATT, GERRARD & BUCKLEY,
Attorneys for bankrupt.

Dated June 16, 1868.

In re Edward Bigelow et al.

Entertaining no doubt that the petition is well filed in this district, I am reluctant to submit the question to the court, as it seems to me that any decision of it would be extrajudicial. But as my brother Ketchum has submitted a similar point (perhaps it arose in a different manner), I do not feel at liberty to decline to do so, as the party is urgent to have it done.

I feel wholly incapable of adding anything to what must have already been urged or suggested itself to the court upon the subject in the former cases that have been submitted.

Respectfully submitted,

I. T. WILLIAMS, *Register.*

BLATCHFORD, J. The petition was properly filed in this court.

The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

June 22, 1868.

U. S. DISTRICT COURT, S. D. NEW YORK.

A bank, organized according to the provisions of the 35th section of the national currency act, has, in order to prevent loss upon a debt previously contracted, a lien upon the share of an individual stockholder, and can apply the same as well to the payment of individual as partnership indebtedness.

In re EDWARD BIGELOW, DAVID BIGELOW, *and* NATHAN KELLOGG, *composing the firm of* E. & D. BIGELOW.

I, THEODORE B. GATES, one of the registers in said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause the following questions arose and were stated, and the facts in relation thereto agreed to by the counsel for the opposing parties as follows, to wit: by Jacob H. Dubois, who appeared for Elijah Dubois, the assignee in bankruptcy of the above named bankrupt, and Peter Cantine, who appeared for the First National Bank of Sau-

In re Edward Bigelow et al.

gerties, a creditor of said bankrupts, individually and as partners.

The First National Bank was duly organized as a national bank in the year 1865, under the provisions of the act of congress, entitled "an act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864.

That an adjudication in bankruptcy in the above matter, upon the petition of a creditor, was made against the above named bankrupts, individually and as copartners, on the 16th day of November, 1867. That on the said 16th day of November, 1867, and prior thereto for two years and upward, David Bigelow and Nathan Kellogg were each stockholders in said bank, and each owned twenty shares of the capital stock thereof, amounting to the sum of \$2,000 each, and said stock

was standing in their respective names on the books of
203 said bank on the sixteenth * day of November, and still so stands there. That on the 16th of November, 1867, David Bigelow was indebted to the said bank individually, the amount of a note which became due November 8, 1867, in the sum of \$637.46, which still remains unpaid. On the 16th November, 1867, Nathan Kellogg was indebted to said bank individually upon notes which had matured at different times between October 15th and November 13th, 1867, in the sum of \$2,971.22, which still continue due and unpaid; that the total liabilities of Nathan Kellogg individually to said bank on the said 16th day of November, 1867, was \$8,048.41. That said bank is a creditor of said bankrupts as copartners to the amount of \$14,745.28, of which amount the sum of \$5,788.38 matured on the 6th day of October, 1867, and was due on and before the 16th day of November, 1867.

The said bank claims to have a lien upon said stock so held by the said Nathan Kellogg and David Bigelow, and to apply the same towards the payment of the indebtedness to said bank as aforesaid, which was due on the 16th day of November last

In re Edward Bigelow et al.

as aforesaid, and refuse to transfer said stock to the assignee of said bankrupts upon the books of said bank ; that said bank stock has not been sold ; that the bank claims such lien under and by virtue of the provisions of the by-laws of said bank.

The assignee and other creditors of said bankrupts, on the other hand, claim that the bank has no such lien, that the by-laws, if valid, do not in fact create or give any lien or preference to said bank upon said stock, for the payment or security of such indebtedness or any part thereof : and if the by-laws do in terms give or contemplate a lien or preference in behalf of said bank over the other creditors, they are void and of no effect as being in contravention of the 35th section of the act of congress aforesaid, under which the said bank was incorporated as aforesaid, and which section is as follows :

“ SEC. 35. *And be it further enacted*, That no association shall make any lien, or discount, on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall within six months from the time of its purchase, be sold or disposed of at public or private sale, in default of which a receiver may be appointed to close up the business of the association according to the provisions of this act.”

That, in the fifth clause of the articles of association of said bank, under which they were organized as a banking association, under the provisions of the act of congress aforesaid, it is provided, in the recital of the powers of the directors of said bank, that they shall, among other things, have power “ generally to do and perform all the acts that it may be legal for a board of directors to do under the act aforesaid, and they shall also have the power to make all by-laws that it may be proper and convenient for them to make, under the said act, for the general regulation of the business of the association, and the entire management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder

In re Edward Bigelow et al.

who may be liable to this association, either as principal debtor or otherwise, without the consent of the board."

That on the 17th day of April, 1865, the comptroller of the currency gave to said bank the usual certificate of its organization as a national institution, under and according to the requirement of the act of congress aforesaid; that on the 11th day of July, 1865, the directors of said bank passed the following resolution: "Resolved, that we adopt the articles of association of the old Bank of Ulster as by-laws."

That the said articles of association so covered by said resolution as aforesaid, contain the following provisions:

"SEC. 3. This association shall not under any pretence loan money on a pledge of shares of the capital stock of the association, but this shall not be so construed as to prevent the association from applying the shares of any individual shareholder in manner hereinafter named, toward the payment of a *bonâ fide* debt, which said shareholder may owe to the association.

"SEC. 4. The association and the board of directors hereinafter mentioned shall have power (whenever any shareholder thereof shall owe a debt then due to the association and which shall have been due and unpaid for the space of three months) to give notice to such shareholder that if such debt be not paid and satisfied at the expiration of ten days from the time of such notice, the shares of the capital stock of this association held by such shareholder or standing in his name, or so much thereof as may be necessary, will be sold in satisfaction of such debt, and if at the expiration of said ten days the said debt of such shareholder shall remain due and unpaid, the board of directors hereinafter mentioned shall have full power and authority to proceed and sell the shares held by such shareholder, or such part thereof as shall be sufficient to pay such indebtedness, either at the board of brokers in the city of New York, or at public auction in the village of Ulster, and to appropriate the proceeds of the sale, if of sufficient amount, in satisfaction of such debt, and, if not of sufficient amount to pay the whole debt, then toward, and on account of, such indebtedness.

In re Edward Bigelow et al.

“ SEC. 5. No shareholder of this association shall be permitted to transfer his share, or receive a dividend or interest thereon, who shall owe to the association a debt, which shall have become due and have remained, for the space of one day, unpaid, until such be paid, unless by and with the consent of the board of directors of the association hereinafter mentioned, and any transfer made contrary to the provisions of this article shall be null and void.

“ ART. 5, SEC. 1. The board of directors shall cause suitable books to be kept for the registry and transfer of the shares of the association, and every transfer to be valid shall be made in such books and signed by the shareholder, or his attorney duly and specially authorized thereunto in writing.

“ SEC. 2. No shares shall be transferred on which any call for an instalment of capital, or any interest on such instalment shall remain unpaid.

“ SEC. 3. Every transfer shall be made and taken expressly subject to all the conditions and stipulations contained in these articles; and every person becoming a shareholder by such transfer shall in proportion to his shares succeed to all the rights and liabilities of prior shareholders.

“ SEC. 4. The board of directors may close the transfer books at any time for a period not exceeding ten days, as the convenience of the association may require.”

The articles of association of said bank were signed, sealed and acknowledged by, among the other corporators, the said David Bigelow, Edward Bigelow, and Nathan Kellogg severally.

As the bank claimed this lien upon the stock, the bank and the assignee agreed upon a statement of facts raising an issue of law, which the register adjourned with cause, giving the following opinion :

OPINION OF THE REGISTER.

I am, therefore, of opinion, that under given circumstances, the national bank may take the shares of one of its stockholders even against his will, but whether the present is such a case, I have very serious doubt.

In re Edward Bigelow et al.

The Bigelows, and Kellogg, were adjudicated bankrupts, as appears by the annexed papers, on the 16th day of November, 1867, and on the petition of the First National Bank of Saugerties.

The indebtedness set out in the case agreed upon and hereto annexed had mostly accrued prior to that time. The assignee was not appointed until the 25th January, 1868.

The articles of association vest in the board of directors power in certain cases to take certain specific measures to attach and enforce their lien; this lien does not proceed of its own vitality, but the officers of the bank must set it in motion, or they gain nothing by it. It is a right reserved in favor of the bank, if the bank elects to avail itself of it, in the prescribed mode.

But if it does not, the debtor is not divested of his title, and if another claimant appears under authority of the law, after the bank might, but before it has taken any step to attach its lien, I doubt whether the second is not the superior claimant.

Here the bank seems to have taken no action to establish its right to the stock in question:

In the mean time the assignee, by operation of law, became vested with title to all the property, both real and personal, of the bankrupt. He interposes in behalf of the creditors, and claims this stock as part of the assets of the bankrupts. Opposed to this claim the bank sets up its dormant lien, which I think was terminated by the non-action of the bank itself, and the appointment of the assignee in bankruptcy.

THEODORE B. GATES, *Register*.

BLATCHFORD, J. I think that the bank has a lien upon the stock so held by Kellogg and Bigelow, and has a right to apply the same towards the payment of the indebtedness aforesaid to the bank, which was due on the 16th of November, 1867, as well the individual indebtedness as the copartnership indebtedness.

The clerk will certify this decision to the register, Theodore B. Gates, Esq.

June 23, 1868.

John Sedgwick v. John K. Place *et al.*

U. S. CIRCUIT COURT, S. D. NEW YORK.

A general assignment by insolvent debtors, under New York state law, for the benefit of creditors, untainted by fraud as against any creditors, or the bankrupt act, is valid, and the property will not be turned over to the assignee in bankruptcy.

JOHN SEDGWICK, *Assignee, &c.* v. JAMES K. PLACE *et al.*

NELSON, J. The bill is filed in this case by an assignee in bankruptcy, to compel the defendants, L. W. Burnett, Jr., and Thomas T. Sheffield, to deliver into his possession certain property and assets, which are claimed as belonging to the estate of the bankrupts, and which have become vested in him under and by virtue of the proceedings in bankruptcy.

The case as presented in the papers is this: The bankrupts suspended payment of their debts, being insolvent, the 20th November, 1867; and several suits having been instituted against them, with a view to an equal distribution of their assets among all the creditors, made an assignment of all their property, real and personal, to the defendants, in trust, to convert the same into money, and pay their debts; and in case the fund fell short of paying all their debts, it should be distributed equally among all of the creditors, *pro rata*.

The assignment was made and executed under and by virtue of the statute of the State of New York, relative to general assignments by insolvent debtors for the benefit of their creditors. It was duly recorded in the office of the clerk of the city and county of New York, and within the time prescribed the assignors made and filed under oath a full and complete inventory of all their estates, real and personal, and of all their debts and liabilities.

The assets were large, and the assignees were required to enter into bonds with good and sufficient security for the faithful discharge of their trust to the amount of \$320,000. The assignees are engaged in the execution of their trust,

This case does not decide that a general assignment is not an act of bankruptcy. Judge Ennis v. Globe Ins. Co. v. Cleveland Ins. Co., 12 Wall. 470, 8 Allen's Rep. 132.

John Sedgwick v. James K. Place *et al.*

and have already on deposit in the United States Trust Company, \$45,000 awaiting distribution among the creditors.

At the time of this assignment the insolvent debtors had no intention or expectation of applying for the benefit of the bankrupt act, nor had the assignees any reason for the belief that any such intention existed. All intention to defraud creditors or to prevent the property of the debtor coming to an assignee in bankruptcy, is denied by the parties: and there is no proof in the case to the contrary.

The insolvent debtors not being able to make a settlement with their creditors, and apprehending the provisions of the bankrupt act might cease relative to voluntary applications, unless by the assent of the creditors, or the payment of fifty cents on the dollar, applied in February following, by petition, for the benefit of the act, and were adjudged bankrupts as copartners on the 7th of that month.

The motion upon this state of the facts is, that the assignment under the state law be set aside, and the assignees render an account to the complainant as assignees in bankruptcy, and that they be restrained from any further execution of the trust.

Assuming the assignment in question to be untainted with fraud, either against creditors or against the bankrupt act, which is the present position of the case, we find nothing in the provision of the law which would authorize us to take this property out of the hands of the assignee under the state law, and turn it over to the assignee in bankruptcy, and must therefore deny the motion for a preliminary injunction.

Motion denied.

John Sedgwick v. William Menck & Charles B. Bostwick.

U. S. CIRCUIT COURT, S. D. NEW YORK.

Where creditors' bills were filed and a receiver appointed, who obtained possession of the property of the debtor, an assignee in bankruptcy has no right to the property thus secured by law to the payment of debts of judgment creditors. Motion to dissolve the injunction granted.

JOHN SEDGWICK, *Assignee*, v. WILLIAM MENCK &
CHARLES B. BOSTWICK.

NELSON, J. The bill in this case is filed by an assignee in bankruptcy, to compel a receiver in creditors' bills against the bankrupt, appointed before the proceedings in bankruptcy, to deliver up the property in his hands as receiver.

The case is this: On the 6th January, 1857, Andrew Beiser the bankrupt, being insolvent, made an assignment of his property, real and personal, to William Minck, giving preferences among his creditors. Creditors' bills were filed against Beiser, the debtor, and Minck, the assignee, and Charles B. Bostwick, one of the present defendants, was appointed receiver; and, on the 16th of March, 1858, he commenced a suit in the common pleas of the city and county of New York, against the debtor and the assignee to recover possession of the assets; and such proceedings were had, that, on the 9th of December following, a judgment was rendered in favor of the receiver, adjudging the assignment fraudulent and void against creditors. From this judgment Minck, the assignee, appealed to the court of appeals, where the case is still pending.

In January, 1868, Beiser, the debtor, was adjudged a bankrupt, and the complainant appointed the assignee; who now seeks to obtain possession of the assets of the estate, the right to which had passed to Bostwick, the receiver appointed under the creditors' bills. The filing of these bills, according to the law of New York, gave a lien upon the assets of the debtor in behalf of the judgment creditors; and the receiver representing their interests has, it seems, been diligently en-

John Sedgwick v. William Menck & Charles C. Bostwick.

gaged in endeavoring to reduce them to possession and apply them to the payment of the judgments.

It is difficult to see what right exists in the assignee in bankruptcy to this property thus devoted by the law to the payment of the debts of these judgment creditors some ten years before any right attached in bankruptcy. The judgment creditors have been subjected to a very considerable expense already in the litigation; and have succeeded in the lower courts in setting aside the assignment as fraudulent, and thereby giving effect to their judgments against the property. Whether they will derive any benefit from the expense and trouble must depend on the decision of the appellate court. It seems to us that they are entitled, at least to this chance, and that the bankrupt's assignee is neither entitled to it himself, nor in a position to deprive them of it.

The question involving the right to this property is in the state court where it belongs, and the decision of that court will be conclusive upon the right. If in affirmance of the judgment of the court below, the property will be applied to the satisfaction of the judgments on the creditors' bills; if in favor of the validity of the assignment, it will take the direction given under the trusts created in the assignment. The right to this property attached long before the assignment in bankruptcy appeared, and before even the passage of this bankrupt law. The motion to dissolve the injunction granted.

In re James L. Fowler, ex parte O'Neil.

U. S. DISTRICT COURT, MASSACHUSETTS.

When a judgment debt is offered for proof against the estate in bankruptcy of the debtor, whose petition was filed after the date of the judgment, it may be objected to by other creditors on the ground of fraud or irregularity, including fraudulent preference, for they are not parties nor privies to the judgment, and may impeach it collaterally.

But the consideration of a judgment regularly obtained in a court having jurisdiction cannot be collaterally inquired into in bankruptcy, except for fraud. The costs and interest are in such case a part of the debt, and can be proved.

*In re JAMES L. FOWLER, ex parte O'NEIL.*¹

THE register took evidence touching the right of O'Neil to prove the amount of a judgment which he had obtained against Fowler before his bankruptcy, and ruled *pro forma* that the question whether all just credits had been given by the creditor before obtaining this judgment, could not be inquired into. He certified that question to the court, and also whether interest and costs could be proved.

A. *Wellington*, in opposition to the proof. A judgment is only binding between parties and privies; it may be impeached collaterally by third persons. *Denison v. Hyde*, 6 Conn. 508; *Shrewsbury v. Boylston*, 1 Pick. 105; *Downs v. Fuller*, 2 Met. 135.

R. M. *Morse, Jr.*, for O'Neil. This is not a case in which a court of equity would enjoin the judgment, and therefore this court will not interfere. *Ex parte Mudie*, 3 M., D. & De G. 66.

LOWELL, J. Creditors, whose interests are affected by a judgment against their debtor, may avoid it collaterally, because they have no right to have it reviewed directly. *Pierce v. Jackson*, 6 Mass. 244; *Downs v. Fuller*, 2 Met. 135. In bankruptcy the creditors are interested in contesting a judgment which is offered for proof in competition with their own debts; and I have no doubt they may show, by any appropriate evidence, that the judgment is void or voidable for fraud or irregularity. A debtor might suffer judgment

¹ Lowell's Decisions p. 163.

In re James L. Fowler, ex parte O'Neil.

against him for the very purpose of affecting the proceedings in bankruptcy; or a judgment may be obtained for a just debt, but under circumstances which would make it a fraudulent preference. In all such cases it must be open to other creditors to object to the judgment when offered for proof against the assets. On the other hand, when the court rendering the judgment, has jurisdiction, and there has been no fraud and no preference, no one can examine into the consideration of a judgment, and show by evidence, outside the record, that the judgment ought not to have been rendered, or not for so large a sum. While the debtor is not bankrupt, nor acting in contemplation of bankruptcy, he binds all the world by his acts and omissions in relation to his own affairs; and if he does not choose to defend an action to which he has a legal defence, and of which he has had full notice, his estate will be committed by his act or neglect, just as it could be by any improvident bargain he might make, or by any new promise to pay a debt barred by the lapse of time or a former discharge in bankruptcy.

When, therefore, the judgment is either void or voidable as of right by the debtor or by creditors, it may be examined into here if offered for proof; where it is valid as against the debtor, and no fraud on creditors is shown, it is valid here. If there be an intermediate case, in which it would be discretionary with the court which rendered the judgment, to vacate it upon the ground of mistake, I should probably leave the assignee to pursue that remedy, postponing the proof in the mean time.

It was said in argument that the English practice goes farther than this, and permits the creditors to inquire into the consideration of all judgments. Some statements as broad as that may perhaps be found in the text-books; but I suppose the English practice, whatever it may be, is founded on the consideration that courts of equity may in many cases reexamine judgments at law, and grant new trials or restrain executions. See *Ex parte Bryant*, 1 V. & B. 211; *Ex parte Mason*, 2 Dea. 245; *Ex parte Prescott* 1 M., D. & De G. 199.

In re Edward Hubbard, Jr.

If this is the reason of the practice, it should not extend beyond the limits that I have laid down ; for a court of equity would certainly not stay an execution where the party has had ample opportunity of defence, and there was no fraud.

There being in this case no offer to prove fraud or irregularity, but only an excessive assessment of damages, I must reject the evidence, and admit the proof for the full amount of the judgment. The costs are part of the debt and can be proved, judgment having been recovered before the bankruptcy ; and so can the interest, which, by a statute of Massachusetts, all judgments bear.

Debt admitted to proof.

July, 1867.

U. S. DISTRICT COURT, MASSACHUSETTS.

A creditor who has proved his debt in bankruptcy, may be permitted to withdraw his proof if it was made under a mistake of fact or law.

Leave to withdraw will usually be granted where the withdrawal will restore all parties to the position they were in before the proof was made ; but not if intervening rights will be affected.

In re EDWARD HUBBARD, JR.¹

IN this case certain creditors proved their debts at the first meeting, on the 25th of November, and on the 21st of December they filed a petition before the register to be allowed to withdraw their proofs of debt from the files, for the reason that, since proof has been made, they had discovered that a certain person named was a dormant partner with the bankrupt, and was solvent ; that they could not by due diligence have discovered this fact earlier ; and alleging that they had discontinued all suits against the bankrupt himself. The register certified to the judge the question whether the petition ought to be granted.

LOWELL, J. When proof has been made under a mistake of fact, or even of law, it may be corrected, almost as a

¹ Lowell's Decisions, 190.

In re James L. Fowler.

matter of course, if neither the bankrupt nor other creditors who have proved will be injured. And even where the rights of others will be affected, if the only effect is to restore all the parties to the position they were in before the debt was proved, it would be proper to allow the withdrawal if there had been a mistake and no want of diligence. In the only case in which I have refused such a petition, the creditor, by proving his debt, had relieved an attachment by trustee process, and the garnishee had in good faith paid over the funds to the assignee. Although I did not believe that any court would hold the lien to be revived by the creditor's withdrawing his proof, yet it was not right to permit such a question to be even mooted.

Under our practice, an order of this kind may be passed by the register, if after due notice no opposition is made; otherwise, by the court.

The decisions on the question are *Morse v. Lowell*, 7 Met. 132; *Ex parte Harwood*, Crabbe, 496; *Bemis v. Smith*, 10 Met. 194; *Safford v. Slade*, 11 Cush. 29; *Beverly Bank v. Wilkinson*, 2 Gray, 519.

Leave to withdraw proof granted.

December, 1867.

U. S. DISTRICT COURT, MASSACHUSETTS.

A debtor over whom the court has jurisdiction commits an act of bankruptcy when he files his voluntary petition for adjudication, and a single creditor cannot resist the adjudication by plea and proof that the debtor is really able to pay all his debts.

If the debtor has property concealed, the assignee is the proper person to receive it for the benefit of the general creditors.

Such a concealment would be itself an act of bankruptcy, and is no ground for refusing to adjudge the debtor a bankrupt on his own petition.

The cases in which creditors may resist an adjudication are when there is some defect in the proceedings, or the court has no jurisdiction.

A petition by one partner against another is *quasi in invitum*, and the objecting partner may show that the firm is not insolvent: though in such a case if creditors intervened, perhaps the court might require security to be given for the payment of the joint debts before dismissing the petition.

In re James L. Fowler.

*In re JAMES L. FOWLER.*¹

JAMES L. FOWLER filed his voluntary petition early in June, being the thirteenth case begun under the act, and before adjudication one of his creditors filed written objections to the petition, setting out that Fowler was not unable to pay all his debts, and that his only object was to delay him in the collection of certain executions which he held against Fowler. The question whether these objections if well sustained in fact were sufficient in law to prevent an adjudication, was heard by the court.

R. M. Morse, Jr., for the creditor. The district court has full equity powers under the statute, analogous to those which the supreme judicial court of Massachusetts exercised under the insolvent law. It will stay proceedings that are improperly brought, as that court has often done. *Thompson v. Thompson*, 4 Cush. 127. That the allegations of the petition may be contested, see *Holbrook v. Jackson*, 7 Cush. 136, remarks of Shaw, C. J.

A. Wellington, for the bankrupt.

LOWELL, J. The district court has power to hear and decide all contested questions, and to stay proceedings improvidently begun. The 11th section of the statute seems to contemplate that voluntary petitions may sometimes be contested, for it provides that the register may make adjudication if there be no opposing party. But it is not the intent of the act that the court should inquire whether the petitioner is insolvent or not. When a debtor swears that he is unable to pay his debts in full, and files the requisite petition and schedules, he has committed an act of bankruptcy, and any creditor may then carry on the proceedings if the debtor shall fail to do so. His act is for the benefit of all persons interested, and cannot be retracted on the application of only one of them, with or without the debtor's consent. No notice is required to creditors before adjudication, and the judge or register is only to inquire whether the debtor owes \$300. Sec-

¹ Lowell's Decisions, p. 161

In re James L. Fowler.

tion 11. That he is unable to pay debts in full, and is willing to surrender all his property is conclusively proved by his petition, so far as a decree of bankruptcy is concerned. He may be, in fact, fraudulent, and able and unwilling to pay his debts; but the law takes him at his word, and makes effectual provision, not only by civil but even by criminal process to effectuate his alleged intent of giving up all his property. If I should undertake, on a preliminary hearing, to decide that the petitioner has ample means to pay his debts, but is unwilling to discover them, and should dismiss the case on that ground, I should be usurping the province of the assignee, and should surrender the very process and remedies which the bankrupt law provides for that exigency; besides giving the single creditor, who objects in order to save some attachment or security, an advantage which the law intends to avoid. The only questions open upon a voluntary petition are those which go to the jurisdiction, such as residence, and a sum total of provable debts of \$300. It is these which section 11 refers to as being possibly contested. So when one copartner petitions and another copartner resists, the latter has an interest to retain his own property, and may show that the firm is not insolvent. A creditor has no such interest in his debtor's property as a partner has in that of his firm. His rights, except when they tend to give him a preference over the general body of creditors, are fully secured in bankruptcy. And even in case of a partnership, the court might perhaps have power to order security to be given for the payment of the joint debts before dismissing the petition.

If this creditor were the only one, and the petition was intended merely to vex and hinder him, or if all the creditors joined in a protest, and were ready to discharge the debtor, there might be some ground to stay the proceedings; but to do it at the instance of one out of several, on the ground that the debtor has undisclosed assets, would be contrary to the whole spirit of the act. There is no such effectual mode of obliging a fraudulent debtor to do justice to all his cred-

In re James L. Fowler.

itors, as to proceed against him in bankruptcy, and the law does not intend that he should do justice to less than all. The only objection made to this adjudication is one which, if true, would be a sufficient reason for adjudging the debtor a bankrupt, namely: that he has property concealed which ought to be used in the payment of his debts. Such fact is evidence of insolvency as well as bankruptcy, and if other evidence than the debtor's petition were admissible, would tend to confirm rather than to disprove the allegations of the petition.

Adjudication ordered.

June, 1867.

INDEX.

ACCOUNT.

Form 35 is the account for the assignee to render where no assets have come to his hands ; and where assets have come thereto, Forms Nos. 37 and 53 constitute the account, and the register has authority to order the assignee to submit and file the same. *In re John Bellamy*, 64.

ADJOURNMENT.

1. Proceedings on the return day of an order to show cause why the discharge should not be granted, can be adjourned by reason of the adjournment of the examination of the bankrupt. *In re George S. Mawson*, 271.
2. The pendency of the examination of a bankrupt is good cause under General Order 6, for adjourning the hearing on the return of an order to show cause, and such adjournment can be made without requiring creditors to file appearance under General Order 24, objecting to discharge. *In re John Thompson*, 323.
3. An adjournment without day, of the proceedings under a petition for discharge, terminates those proceedings, so far as any action under the order to show cause is concerned. The time to file objections can be kept open by adjourning any day which may be fixed for showing cause, until a reasonable time has elapsed for the examination of witnesses. *In re Isaac Seckendorf*, 626.

See REGISTER (POWERS OF), 3.

ADJUDICATION OF BANKRUPTCY.

1. Every failing debtor who gives a preference to a part of his creditors, thereby commits an act of bankruptcy, and a judgment that he is a bankrupt must follow. *In re John T. Drummond*, 231.
2. When two distinct matters, each of which contains a good cause of action or defence, are alleged conjunctively, it is enough if either of them be satisfactorily proved. *Ib.*
3. A debtor over whom the court has jurisdiction commits an act of bankruptcy when he files his voluntary petition for adjudication, and a single creditor cannot resist the adjudication by plea and proof that the debtor is really able to pay all his debts. *In re James L. Fowler*, 680.

4. The cases in which creditors may resist an adjudication are when there is some defect in the proceedings, or the court has no jurisdiction. *Ib.*

AFTER-ACQUIRED PROPERTY.

See EXAMINATION OF BANKRUPT, 6, 7, 16.

AMENDMENT.

1. The register may allow amendments, if uncontested, to bankrupt's schedules of property and liabilities. *In re Charles A. Morford*, 211.
2. The originals of amendments so allowed are to be filed with the clerk. *Ib.*
3. A bankrupt may amend his petition after adjudication so as to bring in his copartner in order to obtain a discharge of copartnership as well as individual debts. *In re William H. Little*, 341.
4. Where the averments of a petition are defective it may be amended, and judgment will be suspended to allow the amendment. *In re Asa W. Craft*, 378.
5. Material additions to the schedules of debts, or of property, are not allowable by way of amendment after the first meeting of creditors, except upon such conditions as may prevent injustice. In some cases the issuing of an alias warrant will be required. *In re Robert Ratcliffe*, 400.
6. A bankrupt cannot amend his schedules by adding other names to the list of creditors, as of course after the warrant and after the close of the business of the first meeting. *In re John Morganthal*, 402.
7. The register may report provisionally as to the conditions on which the amendments should be allowed. *Ib.*
8. Where a petition averred that acts were committed by bankrupt, in contemplation of bankruptcy and insolvency, and evidence of insolvency only was given, the petition should be amended accordingly. *In re Joseph Haughton*, 460.
9. The district court has power to allow amendments in petitions, and proceedings in bankruptcy; but amendments that would introduce into the petition entirely new acts of bankruptcy will be disallowed. *In re Frederick C. Crowley & William L. Hoblitzell*, 516.

See DISCHARGE (OPPOSITION TO), 3; PROOF OF DEBT, 2; SCHEDULES, 2, 8, 10.

APPEAL.

Where an appeal from an adjudication of bankruptcy was made from the district courts to the circuit court, *Held*, such appeal would not lie, and should be dismissed for want of jurisdiction. *In re Mary O'Brien*, 176.

ARRANGEMENT.

See DISMISSAL OF PROCEEDINGS, 3.

ARREST.

1. Aside from the provisions of the bankrupt act, a warrant of arrest under the act of 1842 is irregular and cannot be enforced where there is a pending levy on defendant's personal property by virtue of a *fi. fa.* in the sheriff's hands. *Commonwealth v. O'Hara*, 86.
2. The bankrupt was held in custody by the sheriff of the city and county of New York, under three several orders of arrest. Four actions were pending against bankrupt in state courts. *Held*, That proceedings will be stayed, and the bankrupt will be discharged from arrest in proper cases, until the question of his discharge in bankruptcy shall be passed on in the bankruptcy court. Testimony ordered to be taken and certified by a referee as to whether the actions were for claims that would not be discharged in bankruptcy. *In re Henry Jacoby*, 118.
3. While on his way to be examined as a witness under an order of the register, bankrupt was arrested on mesne process issued by a state court. *Held*, That the arrest was a violation of his privileges, and that he was entitled to be discharged. But, *semble*, it appearing from the affidavits, though not averred in the complaint, that the debt was fraudulent, bankrupt would be liable to be rearrested when such privilege ceased. *In re George W. Kimball*, 193.
4. A debt created by fraud, in which judgment has been recovered, is not affected by a discharge in bankruptcy; hence the sheriff will not be enjoined from an arrest of the bankrupt in an execution issued on such judgment. *In re Charles G. Patterson*, 307.
5. A bankrupt arrested and imprisoned before the proceedings in bankruptcy have commenced, cannot be released by the court upon a petition for a writ of *habeas corpus*. *In re William A. Walker, Petitioner for a writ of habeas corpus*, 318.
6. A United States district court has power to relieve a bankrupt from arrest, on process of a state court, in an action founded upon a debt that may be discharged in bankruptcy. The question whether the debt be one contracted in fraud, may be examined into and determined by the district court. *In re Louis Glaser*, 336.

ASSETS.

See DISCHARGE (OPPOSITION TO), 10; DISCHARGE (MISCELLANEOUS), 1, 8, 9; PARTNERS, 5, 9, 10; PROOF OF DEBT, 1.

ASSIGNEE, CHOICE OF.

1. Creditors who have not proved their debts have no voice or vote in choice of an assignee, nor any right to be heard by attorney or otherwise, in opposition to the proceedings in bankruptcy. *In re W. D. Hill*, 16.
2. Where no creditors attend on the day fixed for the first meeting, the register may appoint an assignee under the provisions of section 13. *In re Mortimer C. Cogswell*, 62.

3. Where it appears that an assignee has been chosen by the influence of the bankrupt, the court will feel bound to withhold its approval; and wherever a register is satisfied that reasons exist why an assignee chosen or appointed should not be approved by the judge, it is his duty to state such reasons fully, in submitting the question of such approval to the judge. *In re Augustus A. Bliss*, 78.
4. A creditor of a bankrupt holding a claim wholly or partially secured, may prove the same in bankruptcy, but cannot vote for assignee. *In re Davis & Son*, 120.
5. Any attempt of a register to influence the choice of an assignee, is unauthorized and improper. Proof of a claim may be postponed until after choice of an assignee. *In re J. Ogden Smith*, 243.
6. A person who has been of counsel for a bankrupt may be appointed assignee, it being understood that he cannot occupy the position of counsel and assignee at the same time. *In re Jules Clairmont*, 276.
7. Where it is shown that an assignee chosen by the creditors resides out of the district, the court will not confirm the choice. *In re James W. Havens*, 485.
8. A motion on the part of the bankrupt to set aside the appointment of assignee can only be entertained by the district judge upon notice, and not by the register. *In re Edward S. Stokes*, 489.
9. Creditors who have proved a debt against a partner of a firm in bankruptcy, have no right to participate in the election of the assignee for the company, who must be chosen by the creditors of the company only. *In re Phelps, Caldwell & Co.* 525.
10. A meeting to prove debts and choose an assignee, should be organized at the hour designated in the official notice, and should be kept open until an assignee is chosen, or it is ascertained that no choice can be made. *Ib.*

See PROOF OF DEBT, 8, 17; SCHEDULES, 12.

ASSIGNEE, DUTIES OF.

1. The assignee is required, by section 15 of the bankrupt act, to sell all the bankrupt's unincumbered estate, real and personal, which comes to his hands, on such terms as he thinks best for the creditor. General Order 21 regulates the sales. *In re George E. White, & John E. May*, 218.
2. An assignee must make his return under Form No. 35 when requested to do so by the bankrupt, when in fact he has neither received nor paid out any moneys, even though he may have reason to believe that he will thereafter receive money as the proceeds of assets of the estate. *In re William H. Hughes*, 225.
3. The right and duties of assignees, and compensation for services, discussed. *Ib.*
4. An assignee desiring to sell property as perishable, or because the title

is in dispute, must apply to the court by petition and not to a register. *In re Graves*, 237.

5. The 20th section of the bankrupt act confers authority on the assignee to make a sale of incumbered property without any order of court. *In re J. McClellan*, 389.
6. When, however, the debt claimed by the creditor is not admitted by the assignee, and cannot be agreed between them, then the assignee should resort to the proper court to ascertain it, and for a sale of the property at the same time. *Ib.*
7. A levy was made by the sheriff on certain goods of bankrupt after the date of filing his petition in bankruptcy. *Held*, that the title being vested in him, the assignee must make sale and deposit proceeds of such goods subject to whatever claims may be determined by the court to be upon them. *G. W. Pennington, Assignee in bankruptcy of James F. Stewart, v. Sale & Phelan et al.* 572.
8. If the assignees are satisfied that property taken by them did not belong to the bankrupt, they should return it without delay ; if, however, they are in doubt, the claimant must seek redress by the appropriate remedy in the courts of the state. *In re Thomas Noakes*, 592.
9. The costs will be paid according to the discretion of the court. *Ib.*
10. The rule requiring the assignee to make a report of exempted property within twenty days, is to receive such a construction as to prevent injustice to the bankrupt, and it may be extended by the court and leave granted to the assignee to make a further report. *In re David Shields*, 603.

See ACCOUNT ; EXEMPTIONS, 4, 7 ; PROOF OF DEBT, 13.

ASSIGNMENT.

1. A general assignment by an insolvent debtor, though made for the benefit of all his creditors, is an act of bankruptcy under the bankrupt act of March 2, 1867. *In re William H. Langley*, 559.
2. Where a creditor is about to get a judgment against his debtor, and the latter makes a general assignment under a state insolvent law for the benefit of his creditors, this is a conveyance with intent to delay, defraud, and hinder, the creditor, and is an act of bankruptcy under section 39 of the bankrupt act. *Ib.*
3. It comes also under the description of a conveyance to defeat, or delay, the operation of the bankrupt act. *Ib.*
4. Where a debtor made an assignment under a state insolvent law, and a creditor applied to the state court to have the security of the assignees increased, this was not such an assent to the proceedings as estopped him from claiming that the assignment was an act of bankruptcy. *Ib.*
5. A debtor made an assignment under the insolvent law of Ohio, on May 25, 1867, and under it, a state court took cognizance of the mat-

ter. On July 17th, a petition in bankruptcy was filed by a creditor. *Held*, that as to this matter the bankrupt act of 1867 was in force on May 25th, and the United States court could rightfully take jurisdiction of the whole matter under the petition filed in July. *Ib.*

6. An assignment made *bonâ fide*, twelve months prior to the filing of the petition for bankruptcy, is good against the assignees of bankrupts; the assignees, except in cases of fraud, take only such rights as the bankrupt had, and could himself claim at the time of his bankruptcy. *In re George H. Arledge*, 644.
7. A general assignment by insolvent debtors under New York state law, for the benefit of creditors untainted by fraud as against any creditors or the bankrupt act, is valid, and the property will not be turned over to the assignee in bankruptcy. *John Sedgwick, Assignee, &c. v. James K. Place et al.* 673.

ATTACHMENT.

1. An attachment was issued out of a state court on the 11th of April, 1867. On a motion to quash the attachment, the court held that the conditional lien acquired by the levy of an attachment may be divested by the operation of a general bankrupt law, and that to this extent the act became a law in March, 1867. Demurrer to motion overruled. *William H. Corner v. E. G. Miller & W. S. Moore, Garnishees of John S. Moody*, 403.
2. Attachments in state courts, brought within four months before a commencement of proceedings in bankruptcy, are dissolved. *In re Ellis*, 555.
3. Moneys arising from sale, *pendente lite*, of property attached, represent the property. Moneys arising from sale of household furniture, sold under process of attachment, belong to the bankrupt. *Ib.*
4. An attachment of a bankrupt's goods under process in a state court, within four months before bankruptcy, is defeated by the provisions of section 14 of the bankrupt act. Demurrer overruled, and the defendant allowed fifteen days in which to answer. *G. W. Pennington, Assignee in bankruptcy of C. D. Bryan, v. J. H. Lowenstein et al.* 570.

See LIENS, 3, 8, 9.

ATTORNEY.

1. The counsellor of the assignee may act as attorney for creditors in bankruptcy proceedings. *In re Samuel W. Levy & Mark Levy*, 184.
2. The claim of an attorney for services and disbursements is not a claim to be paid in full under section 28 of the act of bankruptcy. *In re Louisa Heirschberg*, 642.

See COUNSEL; PROOF OF DEBT, 7.

BANK.

See LIENS, 17.

BURDEN OF PROOF.

See DISCHARGE (OPPOSITION TO), 3, 12.

CARRYING ON BUSINESS.

1. B. acts as agent and attorney for his brother in buying and selling merchandise in New York city, at an office having a sign with his brother's name on it, and well known by those who had dealings with him to be doing such business at that office. *Held*, to be carrying on business within the meaning of the 11th section of the act. *In re Tattall Baily*, 613.
2. Where petitioner in bankruptcy had carried on business and resided in New York for twenty years prior to June, 1866, and removed to New Jersey that year, but was still engaged as a clerk with his successors in business: *Held*, that his petition was properly filed in the district court for the Southern District of New York. *In re William K. Belcher*, 665.

CERTIFYING QUESTIONS.

A question, in order to be properly certified to the judge, must arise regularly in the course of proceedings before the register, and between the parties having the legal right to raise it. *In re J. W. Wright*, 393.

CLERK.

1. When notices, Form 52, are served by mail, the clerk must mail them. *In re John Bellamy*, 113.
2. The order in Form 51, although the register is to direct it to be issued, is to have the signature of the clerk and seal of the court. *Ib.*
3. The register, on directing the order, Form 51, to issue, shall forthwith transmit to the clerk a list of all proofs of debt furnished to the register or assignee, containing names, residences, and post-office addresses of creditors, with sufficient particularity to insure proper service of notice, Form 52. *Ib.*
4. The certificate of the clerk that he has mailed notice to creditors on a certain day, is sufficient evidence to that effect. *In re William E. Townsend*, 216.
5. It is the duty of the clerk to mail the notices. *Ib.*

See FEES, 3, 11.

COMMENCEMENT OF PROCEEDINGS.

See EXAMINATION OF BANKRUPT, 5; JURISDICTION, 14.

COMMERCIAL PAPER.

1. Where a trader stops payment of his commercial paper and does not resume payment thereof within fourteen days, he commits an act of

- bankruptcy. *In re Alfred L. Wells, Jr., ex parte H. B. Claflin & Co.* 171.
2. It is not necessary to show the stoppage of payment of commercial paper was fraudulent; suspension of payment and non-resumption within fourteen days is all that is contemplated by this provision of the bankrupt act. *In re Walter C. Cowles*, 280.
 3. The suspension of payment by a manufacturing company, and non-resumption of payment within fourteen days, does not of itself constitute an act of bankruptcy, unless such suspension is fraudulent. *In re Jersey City Window Glass Company, ex parte R. B. Wigton*, 426.
 4. Leave granted to amend the petition by the insertion of the word fraudulent in the allegation as to suspension of its commercial paper. *Ib.*
 5. A suspension of payment of commercial paper for fourteen days is not, in the absence of fraud, an act of bankruptcy. *In re William Leeds*, 521.

CONCEALMENT.

1. If the debtor has property concealed, the assignee is the proper person to receive it for the benefit of the general creditors. *In re James L. Fowler*, 680.
 2. Such a concealment would be itself an act of bankruptcy, and is no ground for refusing to adjudge the debtor a bankrupt on his own petition. *Ib.*
- See DISCHARGE (OPPOSITION TO), 5; DISCHARGE, (MISCELLANEOUS), 7, 10.

CONFESSION OF JUDGMENT.

1. An insolvent debtor commits an act of bankruptcy by confessing judgment, and allowing his property to be taken on an execution issued thereupon, with intent to give a preference to a creditor. His insolvency or contemplation of insolvency must be averred and shown. *In re Asa W. Craft*, 378.
2. In deciding whether giving a warrant to confess judgment is an act of bankruptcy, the character of the alleged bankrupt's business may be taken into consideration; and where it appears that the purposes of the warrant of attorney may have been to enable the debtor to continue in business, and that there was no intention to defeat or delay the operation of the bankrupt law, it is not a sufficient ground for an adjudication of bankruptcy. *In re William Leeds*, 521.
3. The denial of a debtor, in his answer to a petition of bankruptcy filed against him, is not sufficient to prevent adjudication when it admits the confession of a judgment, although it denies that there was a fraudulent intent to give a fraudulent preference; for such negative allegation implies that the judgment was conferred with an intent to give a preference, although not a fraudulent one. *In re Sutherland*, 531.

CONTEMPLATION OF BANKRUPTCY AND INSOLVENCY.

See AMENDMENT, 18.

CONTEMPT.

A bankrupt who fails to attend on the adjourned day of his examination by reason of sickness, cannot be punished for contempt of court. *In re Josiah Carpenter*, 299.

See EXAMINATION OF BANKRUPT, 19.

CONTRACT OF SALE.

Where the general assignee of the bankrupt made certain conveyances of the real estate, the administrators of the grantee made application to have the amount paid on the contract of sale refunded, which was denied for the reasons that the contract of sale was not delivered up to be cancelled, and further, that there was a failure to show that the transaction with decedent was made in good faith by the general assignee. *In re Jacob H. Mott & Jordan Mott*, 223.

CORPORATION.

A corporation created for the purpose of carrying on any lawful business, defined by its charter, and clothed with power to do so, is such a corporation as is contemplated by the bankrupt act. Any debt which may be proved by complying with any of the provisions of the bankrupt act is a provable debt; suffering a sale to take place from inability to resist is not an act of bankruptcy, even if by so doing one creditor should be preferred to another. After the passage of the so-called ordinance of secession, all acts passed by any pretended legislature are void. The government organized in the states lately in insurrection, by direction of the president, are, by act of congress, declared provisional, with full power to execute such laws as were in force prior to the passage of the so-called ordinance of secession. A sale by the trustees under the provisions of the internal improvement act of Florida, of the stock, franchises, &c., of a corporation organized agreeable thereto, is not an act of bankruptcy. Petition dismissed with cost. *Rankin & Pullan et al., Petitioners, v. The Florida, Atlantic and Gulf Central Railroad Company*, 647.

COUNSEL.

See ASSIGNEE (CHOICE OF), 6; ATTORNEY, 1; WITNESS, 1.

DEFINITIONS.

1. The difference explained between the meaning of the following phrases in section 29th, namely: "since the passage of this act," and "subsequently to the passage of this act." *In re Isaac Rosenfield*, 575.
2. By the term "fraudulent preference," used in item nine of section

29, is meant only, a preference in fraud of the bankrupt act, that is, contrary to its provisions. *Ib.*

DENIAL OF BANKRUPTCY.

See CONFESSION OF JUDGMENT, 3; INJUNCTION, 2.

DIFFERENT DISTRICTS.

1. Where one partner residing in New York city, petitioned individually, and was adjudged bankrupt, and two other partners residing in Cincinnati, Ohio, petitioned, as copartners, to be allowed to join in the application of the first, and file their petitions in the same district: *Held*, that the court had no jurisdiction to grant such leave, as the single partner had petitioned as an individual debtor for an individual discharge. *In re Julius A. Boylan*, 2.
2. A petition was filed by two partners, one of whom neither resided nor carried on business in the district where the petition was filed: *Held*, that such partner must file his petition where he resided. It appearing further, that a third party had been a partner at the time the partnership debts were contracted, and that the members thereof were bankrupt jointly and individually, the court intimated that no proceedings could be had in the other petition or petitions until the third partner joined. *In re Francis T. Prankard & William C. Prankard*, 297.

DISCHARGE, OPPOSITION TO.

1. Where a creditor at the first meeting of creditors gave notice of intention to oppose the discharge, and filed objections, the reception whereof was opposed by bankrupt at that time: *Held*, that a creditor who had proved his debt could file specifications in opposition to the discharge at any time before the period fixed by General Order 24. *In re Adolph Baum*, 5.
2. Two creditors who had not proved their debts appeared at the first meeting, by their attorney, who filed preliminary objections to the proceedings, which the bankrupt moved to strike out. Upon the questions thus raised and certified for the decision of the court, it was *held*: That an objection so filed, that the bankrupt had omitted property from his schedules, was not "an opposition to the discharge of the bankrupt." In no event would such objection avail unless it specified the particular omissions relied on. *In re W. D. Hill*, 16.
3. Specifications in opposition to the discharge of a bankrupt must be specific, but if a creditor desires to amend where they are too vague, or take further testimony in support thereof, he may do so. When the bankrupt has taken and subscribed the oath required by section 37 of the bankrupt act, the burden of proof is on the creditor to show that he has forfeited his right to a discharge. *Ib.* 275.
4. The specifications of the grounds of opposition to the discharge of a bankrupt must be distinct, precise, and specific, so that he may be

- apprised as to what facts he must be prepared to meet and resist. *In re Robert C. Rathbone*, 294.
5. A specification that the bankrupt has falsely set forth in his petition and schedules, that he had no property, is defective, unless it specifies what property he had. Specifications alleging concealment or omissions from the schedules are defective if they do not allege that these acts were wilful, fraudulent, or negligent. *In re Alfred Beardsley*, 304.
 6. A specification in opposition to a bankrupt's discharge which avers that he has property which he has omitted from his schedule, and has been guilty of negligence in delivering to the assignee property belonging to him at the time of the filing of his petition, is specific enough to be triable; likewise a specification averring wilful false swearing to his schedules on the part of the bankrupt. *In re Robert C. Rathbone*, 324.
 7. Incomplete specifications in opposition to a discharge in bankruptcy, may be amended in due course. *In re Charles H. McIntire*, 436.
 8. A discharge in bankruptcy will not be vacated on general averments. *Ib.*
 9. A specification in opposition to a discharge in bankruptcy, that the bankrupt has "influenced the action" of certain creditors by a pecuniary consideration and obligation, is sufficiently distinct to be triable. *In re George S. Mawson*, 437.
 10. Where a bankrupt has charge of, and conducts in his own name, the business of another, taking half of the net profits as his compensation therefor: *Held*, that the right to his share of the net profits is not property to be reported as assets; and that there was no ground for refusing a discharge. *In re Alfred Beardsley*, 457.
 11. The ten days within which specifications in opposition to the discharge of a bankrupt must be filed, date from the adjourned day of the hearing of the order to show cause; and not from the day first appointed. *In re Darius Tallman*, 540.
 12. The creditors of a bankrupt opposed his discharge on the ground that he had procured the assent of a certain creditor to his discharge by a pecuniary obligation. The evidence showed that he had paid this creditor's counsel his fee for services rendered in the matter, amounting to twenty dollars, but it was also shown that this creditor had announced that he would not oppose the discharge, before anything whatever was said about the bankrupt paying his counsel fee, and that such payment was not made a condition of his withdrawing further opposition. *Held*, that the burden of proof was on the creditors opposing the discharge, and the proof did not sustain the specification. *In re George S. Mawson*, 548.
 13. The creation of a debt by fraud is not a ground for refusing a discharge to a bankrupt. *In re Isaac Rosenfield*, 575.
 14. A specification stating that a debt had been created by fraud is not a good specification, and will be stricken out on motion. *Ib.*

15. A fraudulent conveyance made, or a fraudulent preference given, before the passage of the bankrupt act, are neither of them good grounds upon which to oppose a discharge. Such a conveyance or preference does not come within the terms of section 29 of said act, and a specification alleging such a conveyance or preference will be stricken out on motion. *Ib.*

See PROOF OF DEBT, 22.

DISCHARGE, MISCELLANEOUS.

1. When the application for a discharge is made after sixty days, and within six months after adjudication, it is sufficient for the bankrupt to state in Form 51 that no debts have been proved, or that no assets have come to the assignee, to obtain order to show cause why the discharge should not be granted. Upon the return of such order, the court will grant discharge only on satisfactory evidence of no debts proved, and no assets come to the assignee, which evidence will be the return of the assignee. *In re Bellamy*, 64.
2. Under section 32, all the requirements of the act, from the commencement of the proceedings to the end, must be conformed to as prerequisites to the granting of a discharge, and the bankrupt is bound to see to the regularity of such proceedings. *In re John Bellamy*, 96.
3. Before a discharge can be granted the register must, after a careful examination, certify that the bankrupt has conformed to all the requirements of the act; and no discharge will be granted until all the papers are filed with the clerk, as required by General Order 7. *Ib.*
4. In every case of a petition for a discharge, the clerk will enter a special order referring it to the proper register for proper proceedings to be had, and the register, in acting under such special order, will have a fee of \$5 for each day's service, under section 47. *Ib.*
5. The special order referring a petition for discharge to the register is necessary. *In re John Bellamy*, 113.
6. Where discharge is applied for after sixty days from adjudication of bankruptcy, the notice (Form 52) need be mailed only to creditors who have proved their debts. In such case the request of the assignee (Form No. 23) is not necessary. *In re Charles H. McIntire*, 151.
7. A bankrupt who has sworn falsely in his affidavit annexed to his inventory of property, and on his examination before the register, and has concealed his property by covering it up in the name of his wife, forfeits his right to a discharge. *In re William D. Hill*, 431.
8. Where at the time of the application for a discharge, the assignee has neither received nor paid any moneys on account of the estate, the case is to be regarded as one in which no assets have come into his hands. *In re Oliver W. Dodge*, 435.
9. Bankrupt may apply for a discharge within sixty days after adjudication in bankruptcy where debts have been proved, but no assets have come to the hands of the assignee. *In re B. W. & J. H. Woolums*, 496.

10. A bankrupt must be held to have wilfully sworn falsely in the affidavit annexed to his inventory where he states therein that he has no assets when he has concealed his property, derived from profits in the firm of which he is really a partner, by covering them (the profits) up in the hands of his wife. He is further guilty of fraud in not delivering such property to his assignees. Discharge refused. *In re Robert C. Rathbone*, 536.

See ADJOURNMENT, 1, 3; ARREST, 2, 4, 6; DIFFERENT DISTRICTS, 1; LIENS, 11; PARTNERS, 1; REGISTER (DUTIES OF), 7; SECOND AND THIRD MEETING OF CREDITORS, 2; WITNESS, 5.

DISMISSAL OF PROCEEDINGS.

1. Where a petitioner in bankruptcy fails to attend before the register on the day fixed in the order of reference, he may, nevertheless, be adjudicated a bankrupt within a reasonable time thereafter. If he does not appear within a reasonable time, upon the fact being reported to the court by the register, the petition may be dismissed. *In re Benjamin H. Hatcher*, 390.
2. When the petitioning creditor, the bankrupt, and all the creditors who have proved their debts, desire the court to dismiss the proceedings before the choice of an assignee, an order will be made by the court directing that the proceedings be dismissed, and allowing the messenger to deliver up to the bankrupt the property seized, upon the payment of costs. *In re William D. Miller*, 410.
3. After an adjudication has been made it is too late to make a motion to dismiss the proceedings and settle with the debtor. If, however, the parties desire to make a settlement they may proceed under section 43 of the bankrupt act, and have the estate wound up by trustees. *In re Sherburne*, 558.

See APPEAL; CORPORATION; PARTNERS, 11.

EVIDENCE.

Evidence of fraud in the creation of a debt sought to be introduced by a creditor, is inadmissible in proceedings in bankruptcy. *In re Darius Tallman*, 462.

See CLERK, 4; NOTICES, 3.

EXAMINATION OF BANKRUPT.

1. The order for bankrupt or his wife to attend and be examined (Form No. 45), is in the nature of a summons, and may be furnished in blank in the registers, signed and sealed by the clerk. *In re John Bellamy*, 64.
2. In an examination of bankrupts by creditors under section 26 of the act, where questions are objected to, the register will pass upon the same, and permit the parties to take formal exceptions to his rulings.

At the close, a motion to strike out specified points, or to have excluded questions answered, will be entertained, and the questions be certified for decision by the judge, and proceedings thereafter be had in accordance with such decision. *In re Samuel W. Levy & Mark Levy*, 105.

3. In the examination of a bankrupt by creditors, the register will pass upon questions objected to, and formal exceptions being taken, he will, at the close of the testimony, entertain motion to strike out answers or admit excluded questions, and certify the questions to the court. *In re Isidor Lyon*, 111.
4. Bankrupt filed his petition to be adjudicated a bankrupt on the 25th of June, 1867, and was so adjudicated on September 12th, following. During his examination before the register by creditors, he testified to receiving \$5,000 about August 25, 1867, and being asked what became of it, objected to the question, which objection the register overruled. The bankrupt requested that the question so raised be adjourned for the decision of the court, and the register declined. A special case was thereupon made and submitted by the attorneys of the bankrupt and creditors respectively. *Held*, that the register was correct in declining to adjourn the question into court as an issue of law. *In re Charles G. Patterson*, 125.
5. Only such property as bankrupt had at the time of the commencement of proceedings in bankruptcy passed to and vested in the assignee. *Ib.*
6. The time of filing the petition to be adjudicated a bankrupt was the time of the commencement of proceedings in bankruptcy. *Semble*, the same rule applies to involuntary cases where creditors file petitions and adjudication follows. *Ib.*
7. Bankrupt cannot be examined touching property acquired by him after filing his petition to be adjudged a bankrupt. *Ib.*
8. Bankrupt being under examination, was asked by creditors and assignee: "Have you acquired any property since you filed your petition, or since you were declared a bankrupt?" Bankrupt objected. Register sustained objection and excluded the question, whereupon creditors and assignee excepted to his decision and requested that the question so arising be certified to the court for decision. At the conclusion of the examination, counsel for bankrupts proposed to cross-examine, to which creditors and assignee objected that he had no such right. *Held*, the bankrupt is subject to examination and cross-examination like any other witness, and the question thereof was properly certified for decision as a question of law under section 4. *In re Samuel W. Levy & Mark Levy*, 136.
9. The question put to the witness was not a proper question, but the register had no power to decide thereon and was therefore wrong in excluding it. *Ib.*
10. A question put and answered, raises no question or issue of law which

can be adjourned into court under section 4, for decision by the judge. *Ib.*

11. Where a bankrupt, under examination, on being asked whether he had lost property at gaming, objected to the question. The register overruled his objections but the bankrupt refused to answer. *Held*, the question was broad enough to cover time subsequent to commencement of proceedings in bankruptcy, and was therefore improper. *In re Charles G. Patterson*, 152.
12. Where question was put to the bankrupt under examination which he refused to answer : *Held*, no decision could be given as to the question raised, because the certificate did not disclose what interrogatories preceded the one which witness refused to answer. *In re Charles G. Patterson*, 161.
13. Where creditors applied for an order that bankrupts attend and submit to an examination under section 26, and it appears that ample opportunity had previously been given them to so examine them : *Held*, that the application for examination after the expiration of time allowed to amend specifications was unreasonable, as no cause for doing so was shown by affidavit. *In re Isidor & Blumenthal*, 264.
14. A bankrupt is not entitled to witness fees on his appearance for examination before the register. *In re William Okell*, 303.
15. A bankrupt under examination has no right to consult with his attorney before answering, except when the examining magistrate shall see good cause for allowing it. *In re Edward P. Tanner*, 316.
16. A bankrupt cannot be examined as to property acquired or business done after the date of filing his petition in bankruptcy, provided he states that the same has no connection with, or reference to his estate or business prior to said date. *In re Isaac Rosenfield, Jr.* 319.
17. The register has no power to decide on the competency, materiality, or relevancy of any question, and has, therefore, no power to exclude or overrule any question. *Ib.*
18. The bankrupt, under the advice of counsel, must take the risk of deciding whether he will answer or not. *Ib.*
19. If the creditor chooses, he can, upon said refusal, apply to the district judge, to punish the party as for contempt of court, and upon said application, the said judge will decide whether or not the question is a proper one. *Ib.*
20. A bankrupt cannot consult with his counsel or with any one while on the witness stand as to the way or manner he shall answer questions put to him, except when the register in charge of the case shall, in the exercise of due discretion, see cause therefor. *In re Curtis Judson*, 364.
21. A bankrupt on examination may be cross-examined by his own counsel. *In re Stephen B. Leachman*, 391.
22. A bankrupt on his examination before the register, may be examined to show that the debt to the examining creditor was fraudulently contracted. *In re Jacob A. Koch*, 549.

23. The bankrupt may decline to answer, if by so doing he would criminate himself. *Ib.*
 24. The register cannot make any binding decision, or compel a witness to answer, if he refuses. *Ib.*
 25. The register must report the testimony, if required. *Ib.*
 26. In the examination of a bankrupt, he may not consult with his counsel before answering interrogatories, except by permission of the register. *In re John C. Collins*, 551.
 27. A bankrupt having testified that he is not the owner of certain property, questions relating to the identity of the owner, duration, extent and character of the ownership of that property, are irrelevant. Questions relating to the value of furniture and fixtures, and whether a certain person or persons do not own certain property, are, unless the bankrupt is in both instances the owner, irrelevant. All questions which on their face relate to property that does not belong to the bankrupt, are irrelevant. *In re Andrew P. Tuyl*, 636.
 28. A bankrupt cannot be examined for the purpose of showing that the debt was created by fraud. *In re Isaac Rosenfield*, 575.
- See ADJOURNMENT, 1, 2; CONTEMPT; NOTICES, 9; PROOF OF DEBT, 12; REGISTER (POWERS OF), 3, 6.

EXECUTION.

See CONFESSION OF JUDGMENT, 1; LIENS, 6, 7, 8, 14, 16.

EXEMPTIONS.

1. Under the present bankrupt law of the United States, and the state exemption laws incorporated with its provisions, the exemption of such property, real or personal, of the appraised value of \$300, as a bankrupt in Pennsylvania may elect to retain as exempt under the laws of the state, is not included in, but is additional to, the exemption from the operation of the bankrupt law of such necessary and suitable articles, not exceeding in value \$500, as with due reference, in their amount, to the bankrupt's family condition and circumstances, may be designated and set apart by the assignee, subject to the court's revision. But this exception, to the full value of \$500, ought not to be allowed in all cases, without discrimination, or measure. *In re David Ruth*, 154.
2. Section 14 of the bankrupt act must be so construed that over and above the necessary household and kitchen furniture, the assignee may, in his discretion, exempt in favor of the bankrupt "such other articles and necessities as he may think right, so that such exemption, together with the household and kitchen furniture allowed to be retained by him, shall not exceed \$500. *In re Van Buren Cobb*, 414.
3. The bankrupt is also entitled to retain \$300 worth of real or personal property as the exemption allowed by the state where he resides. *Ib.*
4. The assignee must select the property to be exempt under the bank-

rupt law, and should refuse to set apart mere articles of luxury, as gold watches, or pianos, &c. *Ib.*

5. The bankrupt may select the property exempt under the state law, and it is for him to choose or reject articles of mere luxury. *Ib.*
6. The individual members of a bankrupt firm, in Pennsylvania, have no right to any of the partnership assets as exempt property; either under the United States bankrupt law of 1867, or the law of that state. *In re James H. Hafer & Brother*, 547.
7. If the bankrupt should select, under the state law, one hundred dollars' worth of property in real estate, he may receive in addition thereto furniture and other necessities of the value of five hundred dollars, but the allowance of this amount would rest in the sound discretion of the assignee. *In re Thomas Noakes*, 592.

See ASSIGNEE (DUTIES OF), 10.

FALSE SWEARING.

See DISCHARGE (OPPOSITION TO), 6; DISCHARGE (MISCELLANEOUS), 7, 10.

FEEES.

1. Application was made for an order to examine the bankrupt on behalf of a creditor, and the creditor objecting to the charge of a fee of one dollar, by the register, for such order: *Held*, that such an order was not an "order where notice was required to be given" under General Order 30, nor was it an application for any meeting, under section 47, and the register was not entitled to such fee.
2. Where creditor applies, under section 26 of the act, for an order for examination of the bankrupt, he must pay the register's fees allowed by law. Whether such fees will ultimately be paid out of the estate, not considered. *In re James Macintire*, 11.
3. *Seemle*, that a regular taxation by the clerk should be made of all the fees and disbursements in each bankrupt case. *Anonymous*, 24.
4. The sum of \$50, deposited with the clerk, is not a fund in court for general distribution among creditors, but is to be disbursed under the supervision of the court. *Ib.*
5. The sum, or such portion of it as may be necessary, may be appropriated to the register in the first place. *Ib.*
6. Where a bankrupt is relieved by order of the court from further payment of fees, the \$50 deposit will be distributed *pro rata* to the register, clerk, and marshal. *Ib.*
7. Printer's fees are chargeable according to the United States fee bill. *Ib.*
8. Where a debtor who has assets makes advancements as security for fees to the clerk, register, and marshal, he is not to be reimbursed by the assignee out of the estate. *Anonymous*, 122.

9. The assignee should be credited with the fee so paid, and not the petitioner. *Ib.*
 10. Upon return of an order for examination of bankrupt, the attorney for creditor not being ready, the examination was postponed at his request; a question arising as to the fee of the register in the premises: *Held*, that a register is not entitled to a fee of five dollars upon such an adjournment, as for a day's service. *In re Isaac Clark*, 188.
 11. Decision as to the fees of registers, clerks, and assignees, deciding what are legal and what unwarranted and improper. *In re John W. Dean*, 249.
 12. Register's fees discussed, what are legal, and what unwarranted and improper, determined. *In re Jesse H. Robinson*, 285.
- See DISCHARGE (MISCELLANEOUS), 4; EXAMINATION OF BANKRUPT, 14; NOTICES, 5; REGISTER (DUTIES OF), 13, 14, 15; WITNESS, 3, 4.

FIRST MEETING.

See ASSIGNEES (CHOICE OF), 2, 10; DISCHARGE (OPPOSITION TO), 1.

FRAUDULENT CONVEYANCE.

See ASSIGNMENT, 2, 3; DISCHARGE (OPPOSITION TO), 15; RECOVERY OF PROPERTY.

FRAUDULENT PREFERENCE.

See DEFINITIONS, 2.

FRAUDULENT SUSPENSION.

See COMMERCIAL PAPER, 2, 3, 5.

FRAUD.

The trust resulting in favor of creditors, in real estate held by the wife of a bankrupt, inures as assets to his assignee when such property was purchased by the bankrupt prior to his bankruptcy and paid for with his own money in fraud of his creditors. *In re Louis Meyers*, 581.

See ARREST, 3, 4, 6; DISCHARGE (OPPOSITION TO), 13; DISCHARGE (MISCELLANEOUS), 10; EVIDENCE.

GAMING.

See EXAMINATION OF BANKRUPT, 11.

HABEAS CORPUS.

R. deposited goods with S. in New Orleans in 1860, for sale on commission. S. did not account therefor, and was adjudged bankrupt in Louisiana, on his own petition, in June, 1867, and mentioned his debt to R.

in his schedules. R. sued S. in May, 1867, for damages in New York courts, and obtained judgment, and in September, 1867, while S. was in New York city, caused his arrest. S. sued out a writ of *habeas corpus*, to be discharged by the bankruptcy court, on the ground that the debt was provable and dischargeable in bankruptcy. *Held*, that the debt was created while S. acted in a fiduciary character, and was not dischargeable in bankruptcy. *In re James W. Seymour*, 29.

2. Rule 27, G. O. only applies to the court in which bankruptcy proceedings are pending. Prisoner remanded. *Ib.*

See ARREST, 5.

INDORSER.

The liability of a bankrupt as indorser on certain promissory notes having become absolute, a creditor holding a mortgage of property from the maker thereof as security for their payment, may, nevertheless, prove the full amount of the notes against the bankrupt as indorser. *In re Nathaniel O. Cram*, 504.

INFLUENCING CREDITORS.

See DISCHARGE (OPPOSITION TO), 9, 12; REGISTER (DUTIES OF), 7.

INJUNCTION.

1. The United States district court, sitting in bankruptcy, has power, by injunction, to stay proceedings in the state courts against a bankrupt. *In re Horatio Reed*, 1.
2. Creditors petitioned to have copartnership debtors adjudged bankrupts on the ground that they had made preferential assignments, and confessed judgment to other creditors; debtors made denial, and demanded jury trials, which were ordered. Injunction had issued at the instance of one of the creditors restraining proceedings under the assignment and upon the said judgments. On motion to vacate said injunction: *Held*, it would not be dissolved until the question of bankruptcy of the debtors should be determined. *In re Henry F. Metzler & Thomas G. Courperthwaite*, 38.
3. It being alleged that the property was perishable: *Held*, that sale thereof for benefit of all concerned, could not be ordered until it should be in the possession of the marshal as messenger. *Ib.*
4. Judgment was obtained in a state court upon a debt provable in bankruptcy, against a debtor who appealed therefrom and thereafter petitioned and was adjudged a bankrupt. One of his sureties on the appeal becoming insolvent, judgment creditors gave notice to bankrupt to furnish new security or abandon the appeal. Bankrupt applied for injunction to restrain judgment creditors in the premises, which was granted. On motion to dissolve this injunction: *Held*, it was properly granted, and would not be dissolved until bankrupt had reasonable

time to obtain his discharge. *In re Benjamin F. Metcalf & Samuel Duncan*, 201.

5. Injunction to restrain bankrupt and other parties from disposing of the bankrupt's property until the further order of the court. *In re Camp*, 242.
6. An injunction may be issued out of the United States district court, sitting in bankruptcy, to restrain certain creditors of the bankrupt from all further proceedings in a state court, and from intermeddling or interfering with the bankrupt's property, which had been fraudulently assigned, before the commencement of proceedings in bankruptcy, to an assignee of his own selection. *John Sedgwick, Assignee of Andrew Beiser, v. William Menck & Charles B. Bostwick*, 425.
7. Where an execution creditor, under a levy prior to proceedings in involuntary bankruptcy, has been delayed by an injunction under such proceedings, he is entitled to a summary hearing at any stage, after the execution of the assignment. *In re Hafer & Brother*, 586.
8. If the injunction has been issued out of the circuit court, under the equitable jurisdiction auxiliary to that of the district court in bankruptcy, the execution creditor may, at his election, require the assignee as complainant to proceed in the circuit court in equity, or invoke the summary jurisdiction of the court of bankruptcy for a decision of the question of priority. *Ib.*
9. Before the appointment of assignees, a petition for an injunction can be filed only by the bankrupt. After assignees are appointed, the petition should be filed by them. *In re Thomas F. Bowie*, 628.

See JURISDICTIONS, 4; LIENS, 8; STATE COURTS, 2, 5, 7.

JUDGMENT.

1. When a judgment debt is offered for proof against the estate in bankruptcy of the debtor, whose petition was filed after the date of the judgment, it may be objected to by other creditors on the ground of fraud or irregularity, including fraudulent preference; for they are not parties nor privies to the judgment, and may impeach it collaterally. *In re James L. Fowler, ex parte O'Neil*, 677.
2. But the consideration of a judgment regularly obtained in a court having jurisdiction cannot be collaterally inquired into in bankruptcy, except for fraud. *Ib.*
3. The costs and interest are in such case a part of the debt, and can be proved. *Ib.*

JURISDICTION.

1. The jurisdiction of United States district courts sitting as courts of bankruptcy is superior and exclusive in all matters arising under the bankrupt act. *In re R. H. Barrow; Re Loeb, Simon & Co.; Re W. D. Winter*, 481.

2. The United States district court for Louisiana has judicial power to authorize the sale by the assignees of real estate surrendered by bankrupts, free and discharged of all debts secured by mortgage thereon. *Ib.*
3. One M., formerly in business for himself in Chicago, had been employed a year and over as a bookkeeper in New York city, and lived with his father at Elizabeth, New Jersey : *Held*, on a voluntary petition to be declared a bankrupt in Southern District of New York, that this court had no jurisdiction. *In re William H. Magie*, 522.
4. The commencement of proceedings in bankruptcy transfer, to the United States district court, the jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith, and operates as a supersedeas of the process in the hands of the sheriff, and an injunction against all other proceedings than such as might thereupon be had under the authority of that court, until the question of bankruptcy shall have been disposed of. *Jones v. Leach et al.* 595.
5. United States district courts have full and adequate jurisdiction in all matters relating to bankruptcy, at law and in equity. Its jurisdiction, however, to sell real estate and pay off liens, is not exclusive. *In re Thomas F. Bowie*, 628.

See ASSIGNMENT, 5 ; DIFFERENT DISTRICTS, 1 ; RESIDENCE, 4.

LIENS.

1. Liens by the bankrupt law are held sacred, and the creditor is expressly protected by the 14th, 15th, and 20th sections of the act. *In re Hugh Campbell, ex parte Creditors*, 165.
2. The bankrupt's final certificate discharges his person and future acquisitions ; but the lien creditor is entitled to satisfaction out of the property subject to lien. *Ib.*
3. An unimpeached creditor's lien having, before the commencement of voluntary proceedings in bankruptcy, attached upon part of bankrupt's estate, no consideration of probable sacrifice of the subject of the lien under judicial proceedings for its enforcement in a state court, will induce a court of the United States to restrain, delay, or hinder the creditor from prosecuting them. *Ex parte Donaldson*, 181.
4. No equity of the general body of the bankrupt's creditors can be asserted for their common, equal benefit, on the mere ground of doubtfulness of his title to the subject of his lien and the danger of consequent sacrifice at a forced sale. *Ib.*
5. *Quære*, whether such an equity can be asserted on their behalf in any case without such a payment of his demand as may substitute the assignee in bankruptcy for him as to the lien. *Ib.*
6. Judgment was obtained in state court and execution issued thereon, and levy made by sheriff on debtor's property before he filed petition in bankruptcy. *Held*, that the lien of the judgment creditors was good, and was not disturbed by the filing of said petition. *In re Francis Schnepf*, 190.

7. The bankruptcy court has power in such case to allow the goods to be sold under the execution, or to enjoin proceedings thereunder, and to order the assignee to take possession and sell the goods, with leave to the judgment creditors to apply for an order to have their liens satisfied out of the proceeds. *Ib.*
8. Judgment was recovered, execution issued, and levy made by sheriff on the debtor's goods previously attached at the commencement of the suit. Debtor was subsequently adjudicated a bankrupt on petition of creditors, and proceedings of the sheriff were stayed in the premises, but the injunction was afterwards modified to authorize him to sell the goods and hold proceeds, subject to the order of the district court. *Held*, that the lien of the judgment creditors was good, and that the sheriff should apply the proceeds in satisfaction of the judgment, including his fees and charges therein, and pay the overplus, if any, to the bankrupt's estate. *In re Henry Bernstein*, 199.
9. A creditor who has a lien either specific or general must disclose its particular character, that it may legally, and according to its priority, be ascertained and liquidated. *In re Sampson D. Bridgman*, 312.
10. The lien acquired by the commencement of a creditor's suit to reach equitable interest and things in action, should not be regarded as attaching by the mere commencement of the suit, but only when judgment is obtained; otherwise, a creditor claiming such a lien, under proceedings commenced before the enactment of the national bankrupt law, must disclose such proceedings and lien in proving his claim in a court of bankruptcy, and if he do not he thereby waives the lien. *Alexander Stewart v. Siegfried Isidor et al.* 485.
11. Leave to defendants to interpose a supplemental answer, setting up a discharge in bankruptcy, must be granted when it does not appear that the plaintiffs had disclosed their claim of lien in proving their debt in bankruptcy. *Ib.*
12. A prior lien gives a prior claim, and the district court may ascertain and liquidate such a lien. *In re Elijah E. Winn*, 499.
13. The creditor who has a lien on property for the payment of his debt is admitted as a creditor only for the balance of the debt after deducting the value of such property. *Ib.*
14. Where, under an agreement of the execution creditor, the property levied on passes into the possession of the assignee in bankruptcy without prejudice to such prior lien, under the levy, as may be sustainable, the assignee and the register should, if the execution creditor asks it, expedite the proceedings for such a decision. *In re Charles E. Beck*, 588.
15. But such proceedings, though summary and informal, should not be conducted by *ex parte* affidavits, nor otherwise in derogation of the rules of evidence. *Ib.*
16. Before a voluntary petition was filed, execution issued on a docketed judgment came into the hands of the sheriff who had levied on and

held personal property of bankrupt under a prior execution. *Held*, that liens against the real estate, by the New York law, were perfected in both cases within the saving clauses of sections 14 and 20 of the bankrupt act, and that the sheriff should be allowed to sell the personal property to satisfy the executions, and any deficiency would constitute a lien on the real estate, to be discharged on application to the court. *In re John P. Smith & James Smith*, 599.

17. A bank, organized according to the provisions of the 35th section of the national currency act, has, in order to prevent loss upon a debt previously contracted, a lien upon the share of an individual stockholder, and can apply the same as well to the payment of individual as partnership indebtedness. *In re Edward Bigelow, David Bigelow & Nathan Kellogg, composing the firm of E. & D. Bigelow*, 667.

MORTGAGE.

1. A creditor who has a mortgage may apply to the bankrupt court to have the property covered by his lien sold, the proceeds to be applied to the payment of his debt. Should the security fail to satisfy the claim, such creditor may be allowed to prove for the part remaining unpaid, and obtain a dividend thereon. *In re Taylor R. Stewart*, 278.
2. A debtor who executes a chattel mortgage to secure a preëxisting indebtedness with intent to delay, hinder, and defraud his creditors, commits an act of bankruptcy. *In re Walter C. Cowles*, 280.
3. A mortgage given when a debtor was insolvent is not valid, if the mortgagee had reasonable cause to believe that the debtor was insolvent, and that the mortgage was given in fraud of creditors; hence, the prayer of a petition asking that such mortgage be first paid off from the avails of the mortgaged property must be denied. *The Merchants' National Bank of Hastings v. Daniel W. Truax, Assignee of Walter C. Cowles*, 545.
4. Where a creditor, knowing of the embarrassment of his debtor, takes a mortgage to secure a preëxisting debt, and also a credit given at the time of the execution of the mortgage, the mortgage, being void in part as to the preëxisting debt, must be held to be void as to the whole. *C. D. Tuttle v. D. W. Truax, Assignee*, 601.

See INDORSER; PARTNER, 3; PROOF OF DEBT, 22.

NEW PROMISE.

The entry of a debt upon the schedule by a bankrupt is not such an acknowledgment or new promise as will revive the debt. *In re Daniel P. Kingsley*, 329.

NOTICES.

1. The register fixed the day for the first meeting of creditors at sixty days after the date of the warrant, and directed notices to be mailed, postage paid, to the creditors, all of whom resided without the United States. The bankrupt objected that such creditors were to be notified

- constructively, and not by mail or personally, under section 11. *Held*, that the action of the register was correct. The fixing of the time is a matter of discretion in the register. *In re Julius Heys*, 21.
2. The statement of a wrong middle letter of the bankrupt's name, in the notice sent to a creditor, is not a material variance. *Semble*, that the return by the marshal as to the service of notice on creditors, is not conclusive. Sections 12 and 13. *In re William D. Hill*, 16.
 3. The marshal's returns of service of notices to creditors is *prima facie* evidence of due service, and conclusive until rebutted by proof *aliunde*; but if it appears from its face that due service has not been made, the first meeting must be adjourned for proper notice to be given. *In re John Pulver*, 46.
 4. The exact language contained in the warrant should be copied by the messenger into the notices to creditors to be served and published, but the register may disregard all immaterial variance, and omission in the notices of the former residence stated in the warrant held immaterial. *Ib.*
 5. The notices to creditors (Form 52) if sent by mail, must be mailed by the clerk, for which he has his fee by General Order 30. *In re John Bellamy*, 96.
 6. If no creditors have proved their debts, and no assets have been received by the assignee at the time the bankrupt applies for his discharge, the only notice which can be given is by publication, at the discretion of the court. *Anonymous*, 122.
 7. Although no creditors have proved their debts, and there are no assets, an assignee should nevertheless be appointed. *Ib.*
 8. Every creditor is entitled to notice of the proceedings in bankruptcy. A notice not addressed to a creditor by his name is no notice at all. The error may be cured by issuing and serving a new and correct notice. *Ib.*
 9. Where an examination of bankrupts by creditors had been commenced and adjourned over, and the assignee summoned a witness in the meantime for examination as to bankrupt's property, without notice to bankrupt: *Held*, it was not necessary to give notice to bankrupts of time and place of examination of witness, and the same could be proceeded with without reference to the examination by creditors. *In re Samuel W. Levy & Mark Levy*, 107.
 10. If the bankrupt does not apply for his discharge within three months from the date of adjudication, when there are no assets, the notice need say nothing about the second and third meeting of creditors. *Anonymous*, 218.

See REGISTER (DUTIES OF), 11.

PARTNERS.

1. Where one of two partners files a petition in the name of the firm, setting forth the fact that the other partner had already filed a petition in

bankruptcy, an order may be granted that he have leave to join in the proceedings heretofore taken ; but proceedings in regard to his individual creditors will take place under the second petition. Thus, such partner will receive a discharge under his own petition, and so far as the second petition is a petition for an adjudication of the firm, it may be disregarded except as indicating assent to join in the first petition. *In re P. & H. Lewis*, 289.

2. Where a firm consisting of two partners carries on business in the name of the active partner, a promissory note given by him to the silent partner, for the amount of capital contributed by the latter to the joint stock, is the separate note of the active partner. *In re Walter H. Waite et al.* 373.
3. Where such a firm, being insolvent, and known by the partners to be so, is dissolved, and the silent partner conveys all his interest in the joint property to the active partner, who on the same day, and as part of the same transaction, mortgages the whole stock in trade to secure the preëxisting debt of a separate creditor of each partner, and neither partner had any separate estate : *Held*, this transaction is fraudulent, in the sense of the bankrupt law, as a preference ; and both partners are liable to be adjudged bankrupt on the petition of a joint creditor, seasonably filed. *Ib.*
4. A *bonâ fide* transfer of partnership effects by one member of the partnership to another vests the title in the transferee as his separate estate. *In re Owen Byrne*, 464.
5. Where there are both joint and separate debts, proved in a bankruptcy on a separate petition, the joint creditors are not entitled to participate in the distribution of the assets, until the separate creditors are paid in full. *Ib.*
6. The exception allowing joint creditors to receive dividends *pari passu* with the separate creditors, in cases where there is no joint estate, and no solvent partner, is inoperative under the bankrupt law of 1867. *Ib.*
7. A. transferred his interest in partnership effects to his copartner B., on the 2d of October, on his (B.'s) promise to pay the firm debts, without buying any new stock or making any effort to continue the business. B. filed his petition in bankruptcy on the 7th of October : *Held*, that the transfer was accepted by B. in contemplation of filing his petition in bankruptcy, and that the transfer was void as a fraud on the creditors of the partnership. *Ib.*
8. Where A., one of two partners, sells his interest in the concern to his copartner, B., taking his notes therefor, and B. becomes bankrupt, leaving some of the notes unpaid, A. cannot receive a dividend from the assignee until all the partnership debts have been paid. *In re Frederick Jewett*, 495.
9. Where there are both individual and partnership creditors of a bankrupt, but the assets are individual only, though mainly consisting of goods purchased by the bankrupt from the partnership on its dissolu-

tion prior to the bankruptcy, and being principally the same goods in the purchase of which the partnership debts had originated; the partnership creditors will be entitled to be paid *pari passu* with the individual creditors. *Ib.*

10. Where one who was a member of a late firm files his individual petition in bankruptcy, all his creditors can prove their claims, whether individual or partnership. Partnership assets must be administered according to the 36th section of the bankrupt act, and likewise the assets of the separate estate of bankrupt. *In re Alexander Frear*, 660.
11. A petition by one partner against another is *quasi in invitum*, and the objecting partner may show that the firm is not insolvent; though, in such a case, if creditors intervened, perhaps the court might require security to be given for the payment of the joint debts before dismissing the petition. *In re James L. Fowler*, 680.

See ASSIGNEE (CHOICE OF), 9; DIFFERENT DISTRICTS, 1, 2.

PERISHABLE PROPERTY.

See ASSIGNEE (DUTIES OF), 4.

POWER OF ATTORNEY.

1. S. claimed to act as attorney for L. W. & Co., creditors, in the choice of an assignee, upon a power of attorney given to him by K., as attorney for L. W. & Co., acknowledged before a register who certified that K. was known to him as the authorized agent of L. W. & Co., and had acknowledged that he executed the power as such agent. The debt had been previously proved by K. making the affidavit in Form 25, but no power of attorney to K. was produced, nor was his attorneyship proved by the oath of any one: *Held*, that S. was not the duly constituted attorney of the said creditor. *In re William H. Knoepfel*, 23.
2. An attorney sought to represent certain creditors upon an appointment by their general attorney who was himself constituted and approved prior to the passage of the bankrupt act, by a power of attorney authorizing him to sign the firm name to any paper writing, proper or necessary to collect or receive debts due, with power of substitution: *Held*, that the authority of the special attorney was sufficient. *Ib.* 70.
3. The powers given by a letter of attorney to several persons jointly, cannot be exercised by one of the attorneys alone. *In re Phelps, Caldwell & Co.* 525.

PROOF OF DEBT, 6.

PREFERENCE.

See ADJUDICATION, 1.

PROOF OF DEBT.

1. Creditors filed proof of debts on an account current, a check and draft, and interest on the three items. Bankrupt objected and moved to strike out all over a specific sum set out in his schedules as due the creditor, claiming, (1.) That the draft was without consideration. (2.) That the account current was offset by claim against creditors for damages on breach of contract. (3.) That interest on matured debts could not be included in the amount proved against bankrupt's estate. *Held*, That the register should investigate the question of the validity of the draft before proceeding further. That the claim for unliquidated damages by way of set-off should be properly included in the schedule of bankrupt's assets, and should be wholly disregarded in the proceedings for choosing an assignee. That interest might be proved on debts due and payable at the date of adjudication in bankruptcy under section 19. *In re Freeman Orne*, 57.
2. An agent of a creditor filed and proved the claim, but not having power of attorney to vote for assignee, sought to withdraw proof of said claim, partly for the reason that he had not stated in his deposition that the creditor held promissory notes not yet due and had agreed to discharge the claim on their payment. Bankrupt objected. *Held*, that neither proof of debt nor deposition could be withdrawn, but the creditor ought to be allowed and required to amend proof. *In re James M. Loweree*, 74.
3. A holder of a mortgage on real estate of the bankrupt, being named as a creditor in bankrupt's schedules, sought through his lawyer to file a protest against being so named at the first meeting of creditors. Bankrupt objected because the paper was not signed. *Held*, that inasmuch as the creditor did not appear in person or by duly constituted attorney, and had proved no debt, the protest could not be placed on file. *In re Eliza Altenhain*, 85.
4. Where creditors sought to prove debts for which they held promissory notes of bankrupt, and judgment on one of the notes had been obtained: *Held*, that the notes should be produced if required by the register. If debt was proved on the judgment and not on the note, the note need not be produced. *In re William H. Knoepfel*, 70.
5. Objection to the proof of a debt on the ground that it appears on its face that the statute of limitations, if set up, would bar it, is not tenable. *Ib.*
6. An agent of creditor proved the claim of his principal in bankruptcy, and sought to vote for assignee: *Held*, that he could not do so without power of attorney. *In re James J. Purvis*, 163.
7. An attorney at law cannot vote for his client without being duly constituted his attorney in fact. *Ib.*
8. A joint creditor who had proved the joint claim in bankruptcy sought to vote for assignee: *Held*, that if the joint creditors were partners

- he could vote the full amount of the debt; but if he was joint trustee or joint creditor, and no partner, neither could act or vote without consent and authority of the other. *Ib.*
9. A firm creditor of the bankrupt can be counted only as one creditor in the vote for assignee. *Ib.*
 10. Where creditors of a firm prove claims in bankruptcy against a member who had petitioned individually: *Held*, the private creditors only could vote for assignee. *Ib.*
 11. A person to be elected assignee must receive majority of all who have proved claims, and not simply a majority of votes cast. *Ib.*
 12. Bankrupt set forth in his schedules a debt due a creditor which was barred by the statute of limitations of the state in which both resided, and wherein the debt had been contracted. On the creditor seeking to examine the bankrupt, he objected. *Held*, that the debt was provable in bankruptcy, unless it were shown to be barred throughout the United States; and that the creditor had a right to examine the bankrupt under section 26. *Semble*, that under section 22, any creditor claimant may apply for the examination of the bankrupt, whether he shall have proved his debt or not; while under section 26, only creditors who have proved their debts may so apply. *In re James T. Ray*, 203.
 13. All proofs of debt are to be sent to the assignee for him to report them as required by section 22 of the bankrupt act. *Anonymous*, 219.
 14. When the assignee has made his register, he must return the proofs of debt to the register, and they must, under General Order 27, be filed in the clerk's office with the other papers in the case. *Ib.*
 15. A creditor proving his debt against a bankrupt, cannot afterwards maintain a suit, for the claims and unsatisfied judgments already obtained are discharged and surrendered in by the proving of the debt. A creditor may moreover sue any one else liable on the same debt, and proceedings pending against others thereon; and unsatisfied judgments already obtained, are not affected, discharged, or surrendered by the proving of the debt. *In re Samuel W. Levy & Mark Levy*, 327.
 16. A debt barred by the statute of limitations of the state where the bankrupt resides cannot be proved against his estate in bankruptcy. *In re Daniel P. Kingsley*, 329.
 17. A creditor having security, may prove his claim to an amount exceeding the value of such security, without abandoning the same. He is, however, bound to set forth the value of his security, in order to vote as a creditor, in respect to the overplus proven by him, upon the choice of assignee. *In re Henry C. Bolton*, 370.
 18. A debt incurred by the loan of Confederate treasury notes is not provable in bankruptcy. *In re Jonathan J. Milner*, 419.
 19. A debt against a bankrupt's estate may be proven before a United States commissioner, although the bankrupt and creditor both reside in the same judicial district. *In re Luther Sheppard*, 439.

20. A debt barred by the statute of limitations of the state in which the bankrupt resides, may still be proven against his estate in bankruptcy. *Ib.*
 21. A creditor who, after making his deposition to prove his debt, retains possession of the deposition, and does not allow it to pass into the hands of the assignee in bankruptcy, is not a creditor who has proven his debt. *Ib.*
 22. Any creditor of a bankrupt may oppose the discharge, whether he shall have proven his debt or not. *Ib.*
 23. The reservation of a greater rate of interest than six per centum by a national bank, or discounting a promissory note, does not render the debt for the principal thereof, one not provable in bankruptcy. *In re Addison Moore, ex parte The National Exchange Bank of Columbus, 470.*
 24. Creditors waive all right of action against the bankrupt, on either their judgments or the original indebtedness, by proving their debts in bankruptcy, and all proceedings in such suits must be stayed under the 21st section of the bankrupt act. *In re Louis Meyers, 581.*
 25. Creditors having reasonable cause to believe a debtor insolvent, and accepting chattel mortgages from him to secure their debts, thereby participating in such a fraud on the act as to found a proceeding against the debtor in involuntary bankruptcy, will not be permitted to relinquish their intended preferences and claims to prove their debts under the 23d or any other section of the bankrupt act. *In re Thomas Princeton, 618.*
 26. A creditor who has proved his debt in bankruptcy, may be permitted to withdraw his proof if it was made under a mistake of fact or law. *In re Edward Hubbard, Jr. 679.*
 27. Leave to withdraw will usually be granted where the withdrawal will restore all parties to the position they were in before the proof was made; but not if intervening rights will be affected. *Ib.*
- See CLERK, 3; DISCHARGE (OPPOSITION TO), 1, 2; INDORSER; JUDGMENT, 1; MORTGAGE, 1; NOTICES, 7; REGISTER (POWERS OF), 4.

PUBLICATION.

1. Where papers are designated by rules of the court in which notices are to be published, the register cannot substitute other papers therefor in the district, but he may, in the exercise of judicial discretion, select other newspapers without the district, in which notices shall be published. *In re Jesse H. Robinson, 8.*
2. The warrant of adjudication directed the marshal, as messenger, to publish, serve, or mail, notices to creditors for first meeting thereof on July 24. The marshal returned that he had made first publication, and mailed notices July 15. The register decided the notice insufficient, and adjourned the day of meeting to August 8, following. On that day the marshal returned that he had sent notices by mail, to creditors,

- July 29, but no further publication had been made. *Held*, that no sufficient notice had been given before the first return day, and the register acted properly in adjourning the day of meeting. That on the second return day no publication appeared to have been made, and the register should have again adjourned the day of first meeting to allow such publication to be made. *In re Patrick C. Devlin & John Hagan*, 35.
3. Notice was first published on Friday, next time on following Monday, and third time on next succeeding Monday. *Held*, insufficient publication. Seven days must elapse between each publication and the proceeding dependent thereon, in order to publish "once a week for three successive weeks." *In re John Bellamy*, 64.

REASONABLE CAUSE.

The net proceeds of the sale of the property on such process in the hands of the sheriff, will be ordered to be paid to the assignee in bankruptcy, where it appears that the creditor had reasonable cause to believe that the firm was insolvent. *In re James Black & William Secor*, 353.

See MORTGAGE, 3; PROOF OF DEBT, 25.

RECEIVER.

Where creditors' bills were filed and a receiver appointed, who obtained possession of the property of the debtor, an assignee in bankruptcy has no right to the property thus secured by law to the payment of judgment creditors. Motion to dissolve the injunction granted. *John Sedgwick, Assignee, v. William Menck & Charles B. Bostwick*, 675.

RECOVERY OF PROPERTY.

When a debtor, before the passage of the bankrupt act, conveyed his property with intent to defraud his creditors, and afterwards was adjudged a bankrupt, his assignee in bankruptcy may maintain an action to recover back such property for the benefit of the creditors. *Bradshaw, Assignee, v. Henry Klein et al.* 542.

REGISTER, CERTIFICATE OF.

On questions certified by register at the first meeting for the decision of the judge: *Held*, only actual questions arising and existing on issue of law or fact in proceedings had, and not hypothetical questions, or questions in anticipation or likely to arise, are proper to be certified for decision by the judge. So too as to questions on points or matters arising in the course of proceedings, and upon the result of proceedings. Questions stated by consent, must be by parties in a special case upon proceedings actually had. *In re John Pulver*, 46.

See REGISTER (DUTIES OF), 7, 8; REGISTER (POWERS OF), 2.

REGISTER, DUTIES OF.

1. A register is authorized and required, upon the request of a voluntary

- bankrupt, to receive a surrender of his property and safely keep it until turned over to an assignee. General Order 13 applies only to involuntary cases. *In re Abraham E. Hasbrouck*, 75.
2. A register is charged with the general supervision and care of a case, irrespective of motions for amendment, or any other action on the part of creditors, assignees, or bankrupts. *In re Freeman Orne*, 79.
 3. In uncontested cases the order to show cause may be made by the register if the judge so directs specially or generally. *In re Bellamy*, 64.
 4. In an uncontested case, the proper register, by special order of the court, may direct the making of the order to show cause in Form 51, and make it returnable before the court at such register's office. *In re John Bellamy*, 96.
 5. Form No. 4, is a general order of the district court made in each case under General Order 5, and is not a special order. *In re John Bellamy*, 113.
 6. Where a creditor appears and opposes the discharge of a bankrupt before the register, the register must make a certificate of his proceedings, stating such opposition, and return the papers into court in like manner as if there were no opposition. *In re William H. Hughes*, 225.
 7. Where it appears from testimony elicited on the examination of a bankrupt before a register, that a creditor was influenced by a pecuniary consideration paid to the creditor's attorney, although a very small one, not to oppose the discharge of the bankrupt, and the proceedings are certified up by the register to the district court, with the opinion of the register that such payment should not deprive the bankrupt of his discharge: *Held*, that such question is not a proper one for the register to certify to the district judge, inasmuch as the register is forbidden to hear any question as to the allowance of an order of discharge. *In re Mawson*, 265.
 8. A question as to charges of a register in bankruptcy may be raised by an exception, or may, at the request of a party, be certified by the register. The court will not, in all cases, refuse to entertain such a question upon a certificate by the register of his own motion. *In re Benjamin Sherwood*, 344.
 9. It seems that the register may, besides the charges for attendance, &c., specified in the 47th section of the act of congress, and in General Order No. 30, make reasonable charges for his additional services in the business of the private sittings preceding the warrant, the business of the first public meeting of creditors or its adjourned sittings, and the business of another public meeting after the application for a discharge. *Ib.*
 10. At the last of these public meetings before the register, or at any adjourned session of it, the bankrupt's examination may be finished; and if no assets have been discovered, any business performable under the 27th and 28th sections of the act may also be transacted. *Ib.*

11. For all these purposes the notices may be included in the notices for the hearing in court on the bankrupt's application for a discharge. If the business of the meeting before the register is not finished, or the papers are not filed in the clerk's office before the day appointed for the hearing in court, weekly continuances are entered by the clerk, so that the notices may remain in force; and the time for entering opposition is, on the return of the papers, enlarged, for ten days from the next stated weekly session. *Ib.*
12. Services of the register for any of the above mentioned purposes in any one of the counties for which he has been appointed, whether he resides in it or not, are not services under a special order of the court, within the meaning of the 47th section of the act.
13. For his mere attendance, exclusive of any additional services, he is not entitled to more than three dollars per day, unless he should be allowed five dollars for the *first* day on which he may attend under the order of reference when he does not himself appoint the time. *Ib.*
14. Such an allowance of five dollars cannot be made if he thus attends on the first day in two or more cases, and makes a distinct charge for attendance in each. He cannot then receive more than three dollars in each, for the same day. *Ib.*
15. The fees and charges of a register, including those for expenses, may fall short of, or may exceed the amount of the deposit of fifty dollars, required by the 47th section of the act to be made in order to secure them. But it seems that in an unopposed case, in which there is no estate, he cannot be allowed his actual travelling and incidental expenses in journeys to and from any county, however remote, within the limits for which he has been appointed, to an amount exceeding any reasonable proportional part of this deposit. Nor can the business in bankruptcy of such a county be postponed until its accumulation may enable him to lighten such charges by distributing them among several cases. *Ib.*
16. The books and papers in a register's office should be as open to inspection at the local seat of justice, as those in the office of the clerk of a court. *Ib.*
17. It was the intention of congress to make the register's acts the acts of the courts, and to vest them with all the powers of the district courts in relation to all matters about which there is no contest. They are also to give their opinions upon all questions, points, and matters arising before them upon which there is a contest, which opinions will be final unless the parties litigant request the question, point, or matter contested to be certified to the district judge. *In re Henry Gettleston*, 604. .

REGISTER, POWERS OF.

1. The register cannot inquire into the authority of an attorney or counsellor of the circuit or district court, to appear for creditors. *In re William D. Hill*, 16.

2. The certificate of the register to the sufficiency of the inventory of the debtor's debts, is not so conclusive as to prevent inquiry when the question is raised by a proper party at the proper time, and in the proper manner. *Ib.*
 3. Scheduled creditors filed proof of debt, and made motion for an order to examine bankrupt, before day of first meeting of creditors. Bankrupt objected. Register granted motion after argument, and bankrupt moved the question be adjourned for decision by the court. Questions and issue were tendered, but the creditors declined to receive same or join issue. Register then declined to grant motion of bankrupt, who objected to his action, and thereupon requested questions to be certified to the judge. *Held*, that the objection of the bankrupt to the motion for his examination raised an issue of law, which the register should have adjourned for the judge's decision, without any request; but such adjournment was a proceeding that might be waived, and it was waived by the bankrupt submitting the matter upon argument for the register's decision, which disposed of it. No obligation rested on the register after such decision to adjourn the points of the bankrupt into court. *In re Charles G. Patterson*, 101.
 4. That the creditors were entitled to prove their claim before the day of first meeting and had a right to make the motion for examination. *Ib.*
 5. That the register was not bound to notify the bankrupt, or attorney, of the filing by the creditors of their proof of debt before allowing and entering the same, prior to the first meeting, but the court has full control of the debts and proofs, and the bankrupt has his right to object to the validity thereof at the first meeting of creditors. *Ib.*
 6. Where questions were put to bankrupt on his examination touching the acquirement of certain moneys, to which bankrupt objected, and the register overruled his objection: *Held*, that register had no power to decide on the validity of objections or on the admissibility of the questions. *In re Charles G. Patterson*, 147.
 7. The oath of allegiance annexed to the debtor's petition may be taken before a register. *In re Andrew J. Walker*, 335.
 8. Neither court nor register can be the general adviser of assignees as to their acts. No opinion will be given on abstract questions certified to the judge by the register. *In re Edward T. Sturgeon*, 498.
- See ACCOUNT; AMENDMENT, 7; ASSIGNEE (CHOICE OF), 2, 3, 5, 8; (DUTIES OF), 4; DISCHARGE (MISCELLANEOUS), 3, 5, 7; EXAMINATION OF BANKRUPT, 3, 4, 8, 14, 20, 22; LIENS, 14; NOTICES, 1, 4.

RENT.

1. Where the assignee held a store for the purpose of keeping and storing the goods of the bankrupt until they could be sold: *Held*, that the rent for such premises must be paid by the assignee and charged as part of his expenses. *In re Fred B. Walton et al.* 557.

2. *Quare*, Whether under the present bankrupt law of the United States, goods of the estate in the hands of the assignee are distrainable for rent? *In re Benjamin Appold*, 621.
3. If they are not, it is because they are not less in legal custody than goods taken in execution; and under the equity of any laws of the respective states which, like the English statute 8 Anne, c. 14, entitle a landlord to payment of rent accrued, not exceeding one year's, out of the proceeds of goods sold under an execution, the landlord, who is prevented from distraining, may demand such an amount of rent from the assignee in bankruptcy. *Ib.*
4. Such a rule of decision is not inconsistent with apparently contrary decisions under the English system of bankruptcy. *Ib.*
5. Though rent, as such, may not accrue during the proceedings in bankruptcy, an equal charge for storage may, for a certain period, under certain circumstances, be incurred by the assignee. *Ib.*

RESIDENCE.

1. Where residences of creditors are stated in the schedule to be unknown, proof of due inquiry to ascertain the same must be produced by the bankrupt. *In re John Pulver*, 46.
2. The term "residence" refers to the abode of the creditor, whose post-office address should be stated also in the schedules. Personal service may be ordered at the former, or service by mail at the latter. The statement of residence must be such as will insure notice by mail or service in person. *Ib.*
3. Where the warrant stated present residences as unknown, yet stated former residences of creditors, and the marshal returned notices mailed to such creditors, residences unknown: *Held*, such notice was good. *Ib.*
4. Where a bankrupt born in Boston became domiciled in California, but left that state with no intention of returning, and after staying without the United States several months, returned to Boston, and in less than two months thereafter filed his petition in bankruptcy, the act of leaving California with no intention of returning, at once revived the domicil of origin, and a petition filed in this district cannot be vacated for want of jurisdiction, notwithstanding that the bankrupt has not resided within the district for the greater part of the six months next preceding the filing of the petition. *In re William S. Walker, ex parte J. S. Wiggin*, 386.

SALE OF PROPERTY.

See LIENS, 4, 7, 8, 16.

SCHEDULES.

1. It is a sufficient statement in the bankrupt's schedules, to give the sum and date of the debt. *In re W. D. Hill*, 16.
2. Schedules are defective if they do not set forth the separate items of

the bankrupt's personal estate, and they may be remedied by amendment at the instance of the bankrupt. *Ib.*

3. In the course of proceedings in the case of a voluntary bankrupt, it was discovered that his schedules were incorrect and deficient, and the register, on his own motion, ordered the same to be corrected and amended, to which the bankrupt objected. *Held*, that such order may be so made by the register at any stage of the proceedings. *In re Freeman Orne*, 79.
4. He must specify in what particulars they are incorrect or deficient in his judgment. *Ib.*
5. In Schedule A, No. 3, in respect to debts stated, the non-existence, or existence of a promissory note or a judgment, and sole or joint liability of bankrupt, must be also stated in sufficient form. *Ib.*
6. The sign "do," dots, or inverted commas, cannot be used in the schedules by way of reference to indicate anything necessary to be stated. *Ib.*
7. A debtor is not required, in making up his schedules, to use the entire list of forms, but may use only those which are appropriate. He should state why the blanks are omitted. *Anonymous*, 122.
8. A debt due a firm should be scheduled as due the firm under the name and style by which it is known, without designating the individual members thereof. *Ib.*
9. A bankrupt omitted the names of certain creditors from his schedules, for the reason that he supposed the statute of limitations was a bar to the debts due these creditors. *Held*, that the debts in question should have been included in the schedules, and that those creditors were entitled to notices of the proceedings. *In re John S. Perry*, 220.
10. After the schedules are amended a new warrant should issue to be served on the creditors whose names have been introduced by the amendment. *Ib.*
11. The notices should contain the names of all the creditors; if these have been properly published under the original warrant, they need not be repeated. *Ib.*
12. When an assignee has been chosen by creditors under the first warrant, notice of the application to remove him should be given, so that all the creditors who have proved their debts may be heard in such application. *Ib.*

See AMENDMENT, 5, 6; DISCHARGE (OPPOSITION TO), 2, 5, 6; NEW PROMISE; STATUTE OF LIMITATIONS, 2.

SECOND AND THIRD MEETINGS OF CREDITORS.

1. Where no debts have been proved against bankrupt, or no assets have come to the assignee's hands, the order (Form 51) should contain directions under General Order 25, respecting second and third meetings of creditors, if the same shall not have been held. *In re John Bellamy*, 96.
2. If no creditor appears in opposition to the discharge by the return day

of said order, the register may administer to the bankrupt the oath required by section 29. *Ib.*

3. No second meeting of creditors under section 27, and no third or other meeting under section 28 of the bankrupt act, ought to be called, or requested by an assignee, unless there be moneys in his hands for a dividend. *In re Nathan A. Son*, §10.

See NOTICES, 10.

SECURED CLAIMS.

1. Creditors can exhibit and substantiate their claims against bankrupts, so as to comply with the requirements of the 22d section of the bankrupt act, without previously ascertaining the value of securities which they may hold. *In re Edward Bigelow, David Bigelow & Nathan Kellogg*, 632.
2. No permission for them to sell such securities, conceded to be the property of the bankrupt, should be granted until their right to do so is shown in the manner prescribed by said section. *Ib.*

See ASSIGNEE (CHOICE OF), 4; INDORSER; PROOF OF DEBT, 7, 17.

STATE COURTS.

1. Congress, by the Constitution of the United States, had the right to bring all parties, estates, and interests connected with a bankrupt into the district court of the United States as a court of bankruptcy. And to confer upon the district courts the authority to suspend all and every proceeding elsewhere; and to command obedience to their mandates, exclusive of all other jurisdictions. But, by the bankrupt act of the 2d March, 1867, they have not done so. *In re Hugh Campbell*, 165.
2. This act does not authorize the district courts of the United States to issue injunctions to state courts, nor to the actors or parties litigating before them. *Ib.*
3. The act of 2d March, 1793, prohibited it; and this act is not repealed by the bankrupt law, either in express terms or by implication. *Ib.*
4. Courts of a state are independent tribunals, not deriving their authority from the same sovereign, and, as regards the district court of the United States, foreign tribunals every way its equal, and over which the district court has no supervisory power. The bankrupt law does not change the relation of these courts to each other. *Ib.*
5. The authority conferred by the 40th section, to issue an injunction against the bankrupt, and all other persons, has no reference to the state courts, and it is a limitation of the sweeping provisions of the first section. *Ib.*
6. It was designed to protect the property of a party not yet declared a bankrupt, until his bankruptcy has been legally established. *Ib.*
7. The principle decided in Campbell's case, that the district courts of the United States have no power to issue injunctions to state courts, affirmed. *In re S. & M. Burns, ex parte William Burns*, 174.

8. A judgment cannot be assailed in the bankrupt court, but the assignee and creditors must resort to the state court, to test its validity. *Ib.*
9. Affidavit to stay proceedings in state courts. *In re Glaser*, 241.
See LIEN, 3, 6, 16.

STATE INSOLVENT LAWS.

1. The U. S. bankrupt act of 2d March, 1867, as soon as it went into operation, *ipso facto* suspended all action upon future cases arising under the insolvent laws of this state, where the insolvent laws act upon the same subject matter, and upon the same persons, as the bankrupt act. *The Commonwealth, at the instance of James Millingar, v. Michael O'Hara*, 86.
2. The bankrupt act suspends all proceedings under the act of assembly of July 12, 1842, where the latter act operates on the same subject matter, and upon the same persons, as the former. *Ib.*

STATUTES OF LIMITATIONS.

1. A debt barred by the statute of limitations of Maine, where the bankrupt resides, can not be proved against his estate in bankruptcy by a creditor resident in another statute, notwithstanding such demand is not barred by the statute of limitations in the state where the creditor resides. *In re Heman P. Harden*, 395.
2. Such debt is not revived by its entry on the schedule of liabilities of the bankrupt. *Ib.*

See PROOF OF DEBT, 5, 12, 16, 20.

SUFFERING PROPERTY TO BE TAKEN.

1. Where judgment, shown to be fictitious, was obtained against debtor prior to the passage of the bankrupt act, on which judgment execution was issued and property of the debtor was levied upon after the passage of the act: *Held*, that the debtor had procured or suffered his property to be taken by legal process, and had transferred his property with intent to delay, hinder, and defraud his creditors, and had thereby committed acts of bankruptcy. *In re Julius Schick*, 177.
2. Where a firm is insolvent, it is an act of bankruptcy for a member thereof to suffer its property to be taken on legal process, with intent to give a preference to a creditor of the firm. *In re Black & Secor*, 353.

TRADER.

One who is engaged in the manufacture and sale of lumber is a trader within the meaning of the said act. *In re Walter C. Cowles*, 280.

UNIFORMITY OF THE BANKRUPT LAW.

So far as conformity in the procedure under executions out of the federal courts, and out of the courts of the respective states, had been attained under the act of congress of May 19, 1828, and the rules of

practice in the federal court, which, under the authority conferred by that act, had, from time to time, been adopted before the present bankrupt law was passed, the constitutional requirement that the system of bankruptcy should be uniform throughout the United States has been fulfilled, if the bankrupt law operates uniformly upon whatever would have been liable to execution if no such law had been passed, though the subjects of its operation may not be in all respects the same in every one of the states. *In re Benjamin F. Appold*, 621.

UNITED STATES COMMISSIONER.

See PROOF OF DEBT, 19.

VARIANCE.

See NOTICES, 2.

WARRANT.

See AMENDMENT, 5, 6 ; ARREST, 1 ; NOTICES, 4 ; PUBLICATION, 2 ; RESIDENCE, 3.

WIFE.

Where assignee, who was also a creditor, neglected to make his report on the return day of the order to show cause why bankrupt should not be discharged, but subsequently appeared before the register and applied for an order for examination of bankrupt's wife: *Held*, that such order should be refused, as it did not appear to have been made in good faith. *In re Moses Selig*, 186.

See EXAMINATION OF BANKRUPT, 1 ; FRAUD ; WITNESS, 3.

WITNESS.

1. Where a witness objects, by counsel, to examination, on the ground that there was no question in controversy to be settled by testimony, and that the examination of witnesses is not in order until after an examination of the bankrupt: *Held*, "Counsel for witness" is an anomaly leading to confusion and delay. *In re Fredenburg*, 268.
2. The register decided correctly that witness should submit his examination *non obstante* the objections of his counsel. That under section 28 of the act, court can compel the examination of any witness; that submitting to the examination waived the objection, and that the register should have refused to certify the question. *Ib.*
3. The wife of a bankrupt is entitled to witness fees for attendance and travel. Such fees are to be those prescribed for witnesses by the 3d section of the fee bill, act of February 26, 1853. *In re William Griffen*, 371.
4. The fees of a witness must be tendered or paid to him at the time of the service of the summons or a subpoena. *Ib.*
5. The time to examine witnesses does not expire by the bankrupt filing his petition for a discharge. *In re Seckendorf*, 626.

See ARREST, 3 ; EXAMINATION OF BANKRUPT, 8, 9, 12.

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